89-1339

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

FRANK ACKLEY
D.B.A. VILLAGE SQUARE CHEVRON, ET AL.,

Petitioners,

v.

GULF OIL CORPORATION,
CHEVRON U.S.A., INC., and
CUMBERLAND FARMS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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68 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a franchisor's assignment/delegation of franchise rights and performance obligations constitutes a non-renewal or termination of a franchise relationship under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq. ("PMPA).

2. Whether the substantially conflicting decisions of numerous Federal District and Appellate Courts regarding question number 1 above requires resolution by this Court.

3. Whether the delegation of franchise performance obligations to a third party is permissible when the obligee has a substantial interest in the assignor performing, the delegation would materially increase the burdens and risks of the obligee, and where the delegation would result in the obligee's loss of explicit and

intended remedial statutory rights and protections.

4. Whether a valid petroleum market withdrawal has occurred where:

a) The franchisor has a continuing petroleum franchise relationship with its petroleum franchisee, as those terms are defined within PMPA § 2801, within the geographic area from which the franchisor claims to have withdrawn;

b) The petroleum franchisee of the allegedly "withdrawn" franchisor continues to sell the franchisor's trademarked petroleum from franchise retail outlets within the geographic area claimed to have been "withdrawn" from;

c) The withdrawing franchisor has failed to comply with the

mandatory notice provisions of PMPA § 2804.

5. Whether a remedial state statute may be construed in such a way as to render it a nullity.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
LIST OF PARTIES	ix
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
A. Statement of Facts	10
B. Prior Proceedings	26
REASONS FOR GRANTING THE WRIT	26
CONCLUSION	58

APPENDICES:

PETITIONERS HAVE FILED A SEPARATE APPENDIX

TABLE OF AUTHORITIES

CASES **Page**

Ackley v. Gulf Oil Corp., et al., Civ. No. 87-370 25

Aldrich v. Amoco Oil Company (S.D. Iowa 1985) Bus. Fr. Gde. (CCH) para. 8322 . 46

Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986) 28, 39, 46, 49

Berliner Foods Corp. v. Pillsbury Company, 633 F. Supp. 557, 559-560 (D. Md. 1986), citing J.H. Westerberke Corp. v. Onan Corp. 580 F. Supp. 1173 (D. Mass. 1984) 32

Bonebrake v. Cox, 499 F.2d 951, 957 et seq. (8th Cir. 1974) 28

Brattleboro Auto Sales, Inc. v. Subaru of New England, Inc., Bus. Fr. Gde (CCH) para. 7562 (2d Cir. 1980). . . .29, 33

Bruce Smith, et al. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., C.A. No. 87-1051 (W.D. Pa., August 15, 1988) 42, 45, 46

Cedar Brook Service Station, Inc. et al. v. Chevron U.S.A., Inc. and Cumberland Farms, Inc., C.V. 86-4240 (E.D. N.Y., June 5, 1989) 43, 45

Chestnut Hill Gulf, Inc., et al. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., D.C. Mass., No. 86-3519-Mc Memorandum and Order of October 13, 1988, pp. 4-5 . . . 39, 42

Page

Darling v. Mobil Oil Corp., 864 F.2d 981 (2d Cir. 1989) 41

Florham Park Chevron, Inc., et al. v. Chevron U.S.A., Inc. and Cumberland Farms, Inc., CCH Bus. Fr. Gde. para. 9011, pp. 18,418-419 (D. N.J. 1987) 40, 43

Lasko v. Consumers Petroleum of Connecticut, Inc., 547 F. Supp 211 (D. Conn. 1981) 55

May-Som Gulf, Inc. v. Chevron U.S.A., Inc. et al., 869 F.2d 917 (6th Cir. 1989) 28, 45, 49

McGee v. Gulf Oil Corp., (N.D. Ala. 1985) CCH Bus. Fr. Gde. para. 8379 . . 46

Mobil Oil Corp. v. Vachon, 580 F. Supp. 153, 158 (D. Mass. 1983) 54

Morilla, Inc. v. M. Grunmbacher, Inc., 1983-2 Tr. Cases. (CCH) para. 65,499 (D. Mass. 1983) 33

Muha v. United Oil Company, 180 Conn. 720, 729 (1980) 58

N.C. Freed Co., Inc. v. Board of Governors of Federal Reserve System, 473 F.2d 1210, 1215 (2d Cir. 1973), citing Von Hoffman v. City of Quincy, 4 Wall (71 U.S.) 535, 550, 18 L. Ed. 403 (1866) 37

Sally Beauty Co. v. Nexxus Products Company, Inc., 801 F.2d 1001 (7th Cir.

Page

1986) 29, 31, 32, 36

Standard Structural Steel Company, 515 F. Supp. (D. Conn. 1981) 28

Walters v. Chevron U.S.A., Inc., 476 F. Supp. 353, 355 (N.D. Ga. 1979) aff'd 615 F.2d 1135 (5th Cir. 1980) . . . 53, 54

STATUTES

U.C.C. 2-210 . . . . . 2, 7, 29
U.C.C. 2-210(1) 30
U.C.C. 2-210(2) 30

28 U.S.C. § 1254(1) 2

Petroleum Marketing Practices Act ("PMPA") 15 U.S.C. 2801 et seq. 2

PMPA 2801 . . . . . ii, 50

PMPA 2801(a) 51

PMPA 2801(7) 51

PMPA 2801(14)(A) 38

PMPA 2802 . . . . . iv, 38

PMPA 2802(b)(2)(E) 15, 51

PMPA 2804 . . . . . iii, 15

PMPA 2804(a). 52

PMPA 2804(b)(2) 52

PMPA 2805(c) 49

Page

PMPA 2806(b) 4, 27

Connecticut General Statutes
14-344 . . . . . 3, 16, 34

Connecticut General Statutes
42-133k 3, 56

Connecticut General Statutes
42-133k(b) 56, 57

Connecticut General Statutes
42-2-210 2

OTHER AUTHORITIES

Franchising In the Economy 1986-1988,
U.S. Dept. of Commerce, International
Trade Admin. 5, 8, 9

Senate Report at 877 41

Senate Report No. 731, 95th Cong.
2d Sess. 30 (1978) 39

16 C.F.R., Ch. 436 6

Statement of State Senator Curry . . . 35

LIST OF PARTIES

The parties to the proceeding below, and Petitioners herein, are: Robert A. Blosio, d/b/a Long Ridge Chevron, Inc.; James D. Chayka, d/b/a Home Gulf Service, Inc.; Robert Cohn, d/b/a Fairport Gulf; Vincent Condito, d/b/a Vinny's Courtland Service; George S. Lombardo, Jr., d/b/a Avon Chevron Service, Inc.; Paul A. Morello, Sr., d/b/a Morello's Gulf/Morello's Service Station; Douglas Schley, d/b/a Fairfield Gulf; Thomas S. Zawatski, d/b/a Cos Cob Gulf; David MaGuire, d/b/a Al & Bill's Gulf Service, Inc.; Kenneth Cerritelli, d/b/a Cerritelli Chevron Service, Inc.; Santos J. Ciarcia, d/b/a Glastonbury Chevron, and Frederick O'Neil, d/b/a Chevron Car Wash.

Parties to the proceedings below who are Respondents herein are Gulf Oil Corporation, Chevron U.S.A., Inc., and Cumberland Farms, Inc.

IN THE

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OCTOBER TERM, 1989

FRANK ACKLEY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reprinted herein as Appendix A. The Opinion of the District Court for the District of Connecticut is reprinted herein as Appendix B.[1]

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[1] References to "A" are to Appendix A, the Court of Appeals decision; references to "B" are to Appendix B, the District Court's Opinion; references to "C" are to the PMPA statutory excerpts; references to "E.R." are to the Excerpts of Record in the Court of Appeals.

JURISDICTION

The Opinion of the Court of Appeals for the Second Circuit was entered on November 27, 1989. This Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Petroleum Marketing Practices Act ("PMPA") 15 U.S.C. 2801 et seq. Relevant portions of the PMPA are reprinted as Appendix C.

Uniform Commercial Code § 2-210[2] regarding delegations and assignments of commercial contract rights and obligations, which provides in pertinent part:

> (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promissor perform or control the acts required by the contract. No delegation of performance relieves the

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[2] As codified in Connecticut General Statutes § 42-2-210.

> party delegating of any duty to perform or any liability for breach.
>
> (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. . . .

Connecticut General Statutes § 14-344(b), prohibiting refiners such as Gulf and Chevron from operating retail petroleum outlets, which provides in pertinent part:

> "After July 1, 1980, no producer or refiner of petroleum products shall operate a major brand, secondary brand or unbranded retail service station in the state with employees of such producer or refiner, a subsidiary company, commissioned agent or under a contract with any person, firm or corporation managing a service station on a fee arrangement with such a producer or refiner. Any such station shall be operated only by a retail service station dealer."

Connecticut General Statutes 42-133(k), defining the term "franchise" as applicable to relevant state statutes regarding

franchise relationships, subsection (b) of which statute provides in pertinent part:

> "(b) 'Franchise' means an oral or written agreement or arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing motor vehicle fuels and oils and other related products and offering or selling services associated with such products and with gasoline service stations under a marketing plan or system prescribed in substantial part by a franchisor . . . and (2) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, tradename . . . designating the franchisor . . . and includes any agreement between a . . . refiner or producer and a retailer, or between a distributor, wholesaler or jobber and a retailer."

STATEMENT OF THE CASE

The issues and standards relating to the assignment/delegation of franchisor obligations is of critical importance to franchisees operating more than five hundred and nine thousand (509,000) franchise outlets within the United States,[3] including ninety one thousand eight hundred forty (91,840) petroleum franchisees.[4]

Franchisees enter into contractual relationships with their franchisors in clear and intended reliance upon the facts and

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[3] Resulting in sales in excess of $630 billion in the United States in 1988. This represents an increase of 91% over the level of franchise sales at the beginning of the 1980s. Employment in franchising is expected to reach 7.3 million in 1988. U.S. Department of Commerce, International Trade Administration, Franchising In the Economy 1986-1988, at p. 1.

[4] Franchising In the Economy 1986-1988, Table 3 at p. 28. This represents a decline from 222,000 petroleum franchisees in 1970. Franchising In the Economy, Table 10 at p. 35.

circumstances existing at the time the relationship is commenced, and the quality and experience of their franchisor.[5] However, franchisors have, to an accelerating degree, been seeking to delegate their franchise performance obligations to third parties with whom their franchisees have had no prior relationship, nor expectation of a relationship. Oftentimes, as in this case, these assignees are prior competitors of the franchisees. These delegations have occurred both as a result of outright delegations/assignments, or franchisor mergers and acquisitions, oftentimes

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[5] Recognizing the paucity of information previously provided to prospective franchisees, and the industry's abusive history, the Federal Trade Commission has enacted significant franchisor factual disclosure guidelines (16 C.F.R., Ch. 436), as have numerous states, which disclosures prospective franchisees are intended to rely upon in determining whether to become involved in the franchise relationship.

resulting in the acquiring franchisor incurring significant debt obligations.

Within the petroleum industry, Arco in 1986 withdrew from the entire eastern United States, delegating its franchise obligations to prior competitors such as Shell, and to others with no experience whatsoever in petroleum franchising, such as Atlantic Petroleum. Exxon is presently involved in the "trading" of franchisees with Texaco in California, Nevada, Oregon and Washington.

Similar franchise delegations have taken place involving thousands of Burger King franchisees throughout the United States regarding Pillsbury's acquisition of Burger King. Most recently Roy Rogers announced the intended sale of thousands of franchisee operations to Hardees.

The provisions of the U.C.C., primarly § 2-210, were enacted to address assignment and

delegation issues in the context of commercial transactions such as franchise relationships. In addition, the PMPA was enacted to address the issue of petroleum franchisor assignments and delegations, market withdrawals, and service station location sales within the petroleum industry nationwide, and the affect that those practices have upon franchisees which Congress recognized as having been long abused.[6] The application of PMPA's statutory standards has become significantly confused, however, as a result of numerous conflicting decisions within the federal district and

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[6] Since the date of the enactment of PMPA in 1978, there has been a thirty-four percent (34%) reduction in the number of petroleum franchisees, from one hundred and thirty nine thousand five hundred sixty-three (139,563) in 1978 to ninety one thousand eight hundred and forty (91, 840) in 1988. Franchising In the Economy 1986-1988, supra, Table 3 at p. 28, and Table 13 at p. 38.

appellate courts.

The application of the standards of the U.C.C. to general franchise assignments and delegations is of major importance to the future evolution of the industry, and to franchisee and franchisor rights and obligations. The U.S. Department of Commerce predicts that franchising will be the leading method of doing business in the 1990s within the United States.[7] This Court has at no time construed the provisions of the PMPA, and has only in a very limited fashion reviewed issues relating to the franchise industry as a whole. The resolution of these questions is of enormous practical consequence, since they go to the very heart of the continuing evolution of the franchise marketing system within this country. If the decision of the

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[7] Franchising in the Economy, supra, at p. 6.

Court of Appeals is allowed to stand, it threatens to imperil the continuing rights of hundreds of thousands of franchisees to receive satisfactory performance of their franchisors' obligations. The issues presented are therefore of exceptional national significance, meriting review by this Court.

A. STATEMENT OF FACTS

Petitioners are twelve petroleum franchisees, each of whom operates a service station business from leased marketing premises located throughout the State of Connecticut. Prior to July 1, 1985, the Gulf Oil Corporation ("Gulf") was the franchisor of several of the Petitioners. On July 1, 1985, Chevron merged with Gulf, creating Chevron U.S.A., Inc. ("Chevron"). Chevron had also been the franchisor of several of the Petitioners before its merger with Gulf.

Both Gulf and Chevron were major international integrated refiners and distributors of petroleum products before their merger.

Under the terms of an agreement between Chevron and Cumberland dated December 19, 1985, Cumberland purchased assets and properties owned by Chevron throughout the northeastern United States. Those purchases included all of the service stations owned or leased by Chevron located within the State of Connecticut, including those locations occupied by the Petitioners.

Before entering into its agreement with Chevron, Cumberland was primarily a convenience store chain operator, operating approximately twelve hundred (1,200) convenience stores throughout the east coast. Approximately half of Cumberland's convenience stores also marketed gasoline.

Cumberland operated its convenience stores only through the use of its own employees. Cumberland had no franchise dealers. Although both Gulf and Chevron were refiners, Cumberland has consciously avoided acquiring the status of a refiner.[8]

Under the terms of its agreement with Cumberland, Chevron also delegated to Cumberland all of its contractual franchise obligations regarding those petroleum franchisees located throughout the northeast, including the Petitioners. This included approximately eleven hundred (1,100) franchisees.

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[8] E.R. 782 and 788. Prior to reaching its agreement with Chevron, Cumberland had acquired numerous service station locations from other suppliers, some of which were occupied by franchisees. Those locations occupied by franchisees were either divested by Cumberland or turned into company operations after the removal of the franchisee from the location. E.R. pp. 782-786; 841-844.

Cumberland eventually paid $238,500,000 to close the transaction.[9] To finance the transaction Cumberland was required to secure financing from the Bank of Boston in the amount of $250 million.[10] The service station properties acquired by Cumberland represented the major portion of the security for the financing obtained. Cumberland recognized that the station rents would have to be increased substantially in order to service the debt. It also intended to service the debt from profits generated by the sale of gasoline to its newly acquired franchisee locations, and from the sale of other products to those locations.[11]

After having reached agreement with Cumberland Chevron provided to each of its

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[9] E.R. pp. 186; 776-777, 789.

[10] E.R. pp. 789-790.

[11] E.R. pp. 791-797.

franchisees within the northeast, including the Petitioners, letters informing them of the intended transaction.[12] Chevron informed the franchisees that the sale was expected to close between May 1 and June 15, 1986. Further, Chevron would be assigning/delegating to Cumberland Farms all of its franchise rights and obligations. Franchisees who had been selling gasoline at retail under the Chevron trademark would be required to adopt the Gulf trademark. Chevron further stated that it did not believe that the sale to Cumberland, and the delegation to Cumberland of Chevron's franchise obligations, represented either a termination or non-renewal of those franchises under the PMPA. However, Chevron

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[12] Two separate letter notifications were provided to the Petitioners on February 14, 1986 and March 10, 1986. E.R. pp. 263, 267.

stated that if anyone later claimed that the sale and delegation involved a termination or non-renewal subject to the PMPA, Chevron was taking the "precaution" of giving its franchisees "formal notice of non-renewal under the PMPA." Chevron stated that it was non-renewing its franchisees because of its "determination to withdraw from the marketing of motor fuels throughout retail outlets in the geographic marketing area".

PMPA § 2802(b)(2)(E) provides that a "geographic market withdrawal" may be proper grounds for the termination or non-renewal of a petroleum franchise relationship if certain conditions, as discussed hereafter, are met.[13]

Thereafter, on June 1, 1986, only one

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[13] The mandatory written notice provision of PMPA § 2804 requires that franchisees be provided with written notice of the franchisor's intent to conduct a market withdrawal not less than one hundred and eighty (180) days before the actual "event" of withdrawal takes place.

hundred and five (105) after having provided notice of its intended market withdrawal to its franchisees, Chevron completed the "event" of market withdrawal by the transfer of all of its marketing assets within the northeast, and the delegation of all of its franchise obligations to Cumberland.[14]

Chevron and Gulf had both been refiners of gasoline when they were the franchisors of the Petitioners. Before Chevron's transfer of assets and delegation of duties to Cumberland on June 1, 1986, Cumberland had only marketed gasoline under the "Cumberland Farms" trademark or, alternatively, under other trademarks owned by Cumberland which were in no way related to a refiner.[15] Under the provisions of Connecticut General Statutes § 14-344(a) and (b), refiners such

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[14] E.R. pp. 274, 919-920.

[15] E.R. pp. 880-881; 897-898.

as Chevron and Gulf are explicitly prohibited from marketing gasoline from retail service station locations in Connecticut unless the service station location is operated by a franchisee. Chevron and Gulf were therefore at all times prohibited from selling gasoline within the State of Connecticut from company operations operated by employees. After June 1, 1986, however, this competitive prohibition and protection no longer applied to the franchisor of these Petitioners, since Cumberland is not a refiner.

Before June 1, 1986, Cumberland company-owned and employee operated fifty seven (57) Cumberland convenience stores selling gasoline under the Cumberland Farm's trademark within Connecticut. While either Gulf or Chevron was the franchisor to these Petitioners, it was statutorily prohibited from such activities. The Petitioners are

therefore now, for the first time, in competition, or prospective competition, with not only their own supplier, but a supplier competing in the very same marketplace, for the very same customers, selling under the same trademark, using the same credit card, with a pre-existing gasoline station network in Connecticut of fifty-seven stations. This is also in a situation where the competitive abilities of each of the dealers is now virtually dictated by Cumberland pursuant to the existing franchise agreements which substantially dictate the marketing activities of each of the Petitioners.[16]

The present situation in which these Petitioners find themselves must be contrasted with the situation where, before June 1, 1986, Chevron marketed solely through

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[16] E.R. pp. 669-677; 678-686; 687-695; 696-704; 705-713; 714-720; 752-763; 764-771.

it franchisees, and was in competition with Cumberland for gasoline sales. Cumberland's new-found ability to use the Gulf trademark for its network of retail locations, as compared to its prior sale of gasoline to the public under Cumberland's name alone, has provided Cumberland's company-operated stations with a significant advantage in the gasoline marketplace.[17]

After June 1, 1986, each of the Petitioners was required to purchase all of their gasoline from Cumberland. Each of Cumberland's fifty-seven company-operated retail locations in Connecticut also obtained all of their gasoline supply from Cumberland. However, Cumberland's company-operations obtained that gasoline from Cumberland at significantly lower prices than Cumberland

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[17] Statement of Cumberland President Haseotes, E.R. at 806(a).

charged to its captive franchisees, including the Petitioners, for the very same product.[18] Cumberland unilaterally sets both the price which it charges its franchisees/the Petitioners, and the price which it charges to its company-operated locations.[19] The price paid by the Petitioners to Cumberland is generally five to seven cents higher than that price charged by Cumberland to its company-operated locations, and has been as much as thirteen cents higher.[20] As a result, Cumberland's company-operated locations also sell gasoline, at retail, below the wholesale price Cumberland charges the Petitioners.[21]

The record is uncontradicted regarding the fact that the favored price given to

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[18] E.R. pp. 863, 868, 908.

[19] E.R. pp. 876-877; 904-905.

[20] E.R. pp. 866(a)-(b).

[21] E.R. pp. 862-863.

Cumberland company-operations places, and threatens to place, franchisees such as the Petitioners at a significant competitive disadvantage regarding the sale of identical gasoline under the Gulf trademark to the motoring public.[22]

Before Chevron's delegation to Cumberland the Petitioners' supplier could not retail Chevron gasoline from company-operated service station locations in Connecticut, and could not be in actual or threatened competition with its franchisees, since such activities were statutorily prohibited. Further, there was no incentive for the Petitioners' supplier to terminate or non-renew their franchises in order to convert their locations to company operations. The situation totally changed, however, as a

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[22] E.R. pp. 671, 680, 689, 698, 707, 716.

direct result of Chevron's delegation to Cumberland.

Within a few months after Chevron's delegation of duties, and "market withdrawal", Cumberland provided each of the Petitioners with franchise renewal documents. As a direct result of having incurred substantial debt in order to complete its transaction with Chevron, Cumberland now imposed huge rental increases upon the Petitioners.[23] The average rental increase imposed by Cumberland was 176% for the three year renewal term. Conversely, for the three year term of Chevron's prior franchise renewals, the total rental increase averaged 14.7%, i.e., less than 5% annually. Faced with the refusal of Cumberland to negotiate the rental increases, each of the Petitioners was required to execute the renewal documents

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[23] E.R. 795-796; 884-885.

under threat of termination and loss of their livelihood.[24] Under the terms of Cumberland's renewal documents, Cumberland also controls product delivery times and methods for gasoline, dealer counselling regarding gasoline sales and pricing, pump and storage tank maintenance and repair, advertising, imposition of contractual performance obligations (such as hours of operation), personal supervision requirements, reconstruction standards, and capital improvement decisions. It is uncontradicted in the record below that these factors all have a clear and significant competitive impact on the marketing of gasoline at each of the Petitioners' locations.[25]

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[24] Those renewal documents were executed and returned to Cumberland with letters of protest from the dealers.

[25] E.R. pp. 324-336; 341-353; 357-368; 373-385; 390-402; 406-417; 422-434; 470-481; 481-498; 503-515; 519-531; 536-546; 550-563; 567-578; 582-592; 597-605; 669-

As a further result of the Petitioners' loss of the protection from supplier operated retail service station locations, there is a substantially increased risk that the Petitioners' franchises will be replaced with company operations, and the market values of the Petitioners' franchises have been significantly reduced.[26] The Petitioners had a clear and substantial interest in such a prohibition restricting the retail marketing activities of their supplier, which remedial protections were destroyed as a direct result of Chevron's delegation to Cumberland.[27]

731.

[26] The record is totally uncontradicted in this regard. E.R. 752-763; 764-771. Replacement of franchises by company operations would conform with Cumberland's prior location purchase practices. One Petitioner who has been terminated by Cumberland already has had his prior location turned into a company-operation.

[27] E.R. 673 (para. 14-15); 682 (para. 14-15); 691 (para. 14-15); 700 (para. 14-15); 709 (para. 14-15); 717 (para. 14-15);

The record therefore makes it abundantly clear that Chevron's delegation of its obligations to Cumberland was, and remains, clearly unsatisfactory to the Petitioners. That delegation materially increases the risk of unsatisfactory return performance being provided to the Petitioners, and has resulted in the Petitioners' loss of significant remedial statutory protections.

Additionally, the Petitioners have claimed that, even if the assignment of their franchises, and Chevron's market withdrawal, were valid, that their Chevron franchises were automatically renewed thereafter under state franchise law.[28] The District Court denied the Petitioners' claims by finding that their relationships with Chevron were

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752-763; 764-771.

[28] Companion cases Ackley v. Gulf Oil Corp., et al., Civ. No. 87-370, and Cohn v. Gulf Oil Corp., et al., Civ. No. 87-716.

not "franchises" under state law.

B. PRIOR PROCEEDINGS

The Petitioners' Amended Complaint was filed on February 22, 1988. Cross motions for summary judgment were filed by the parties. The District Court (Burns, J.) granted the Defendants' Motion for Summary Judgment, holding:

1) Chevron's assignment to Cumberland was valid under state law and therefore not a terminating event under the PMPA;

2) The dealers were not franchisees under state law, and therefore had not been automatically renewed under that statute. (Appendix B.)

The Court of Appeals affirmed the decision of the District Court. (Appendix A.)

REASONS FOR GRANTING THE WRIT

I. Chevron's delegation of its franchise performance obligations to the Petitioners

was invalid under the U.C.C.

The Petitioners claim that Chevron's assignment/delegation of the Petitioners' franchises was invalid, and thereby resulted in an impermissible termination of their petroleum franchises on June 1, 1986.

The parties agree that PMPA § 2806(b) specifically provides that the validity or invalidity of the assignment/delegation of a petroleum franchise is to be determined by reference to applicable state law. B-23(a). PMPA § 2806(b) provides as follows:

> (b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise, or by any applicable provision of state law which permits such transfer or assignment without regard to any provision of the franchise.

The franchise agreements between Chevron and each of the Petitioners make no provision whatsoever for the delegation of Chevron's

obligations to the Petitioners.[29]

If the attempted assignment/delegation of a petroleum franchise is invalid under applicable state law principals, a franchise termination under PMPA has occurred. Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986); May-Som Gulf, Inc. v. Chevron U.S.A., Inc. et al., 869 F.2d 917 (6th Cir. 1989).

Since the clear intention of the parties is that the "dominant factor" in their franchise relationships was the sale of trademarked petroleum products (i.e. a transaction in goods)[30] such agreements are to be treated as "sales of goods" contracts

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[29] See sample agreements. E.R. 276 et seq. and 308 et seq. Those agreements do, however, prohibit the Petitioners from assigning their rights and obligations to third parties. E.R. p. 304 para. 9 and p. 312(a) para. 13.

[30] Standard Structural Steel Company, 515 F. Supp. (D. Conn. 1981); Bonebrake v. Cox, 499 F.2d 951, 957 et seq. (8th Cir. 1974).

under the U.C.C.[31] U.C.C. § 2-210 (C.G.S. 42a-2-210) specifically addresses the instances in which such franchise obligations may be assigned/delegated. That section of the U.C.C. provides:

> (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promissor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.
>
> (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance . . . .

Since virtually all franchise relationships in the United States are

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[31] Sally Beauty Co. v. Nexxus Products Company, Inc., 801 F.2d 1001, 1005 (7th Cir. 1986); Brattleboro Auto Sales, Inc. v. Subaru of New England, Inc., Bus. Fr. Gde (CCH) para. 7562 (2d Cir. 1980).

"transactions in goods", and therefore treated as "sales of goods" pursuant to the U.C.C., this provision of the U.C.C. is applicable to virtually all assignments/delegations of franchise rights and obligations throughout the United States. This provision of the U.C.C. sets forth a general policy allowing for delegation except where the performance of the delegated obligations by a third party would be unsatisfactory to the franchisee. U.C.C. 2-210(1). Additionally, franchisor attempts to assign/delegate its rights and obligations are impermissible if such an assignment/delegation would materially increase the burdens or risks imposed upon the franchisee, or materially impair the franchisee's chance of obtaining satisfactory return performance. U.C.C. § 2-210(2).

Herein, it is clear that the Petitioners had a "substantial interest" in Chevron, as compared to Cumberland, performing or controlling the franchisor obligations in the franchise relationship. The record below is clear, and undisputed, that the Petitioners' burdens and risks increased as a direct result of Chevron's assignment/delegation to Cumberland, resulting in a material impairment of the Petitioners receiving their reasonably expected satisfactory return performance. The purpose and intent of the U.C.C. in this regard is to balance the general policy of free alienability of commercial contracts, while also protecting obligees such as the Petitioners from being forced to accept a bargain which they did not contract for. Sally Beauty Company, Inc. v. Nexxus Products Company, Inc., 801 F.2d 1001, 1006 (7th Cir. 1986).

The risk of an unfavorable outcome befalling the Petitioners as a result of Chevron's attempted assignment/delegation is clearly not one which the law can force upon these franchisees. Several cases have examined similar situations where an assignor (Chevron) has attempted to delegate its duties to an obligee (the Petitioners) to an assignee (Cumberland) who is a competitor of the obligee. While few in number, those cases uniformly hold that the duty of performance may not be delegated to a competitor of the obligee in the marketplace, nor to a wholly-owned subsidiary of a competitor, without obtaining the obligee's prior consent. Sally Beauty Company v. Nexxus Products Company, Inc., supra, at 1007-1008; Berliner Foods Corp. v. Pillsbury Company, 633 F. Supp. 557, 559-560 (D. Md. 1986), citing J.H. Westerberke Corp. v. Onan

Corp. 580 F. Supp. 1173 (D. Mass. 1984) and Morilla, Inc. v. M. Grunmbacher, Inc., 1983-2 Tr. Cases. (CCH) para. 65,499 (D. Mass. 1983). If, under all the facts and circumstances, including "subjective" evidence of such facts and circumstances, the acts of a franchisor or franchisee, relative to the other, and relative to the franchise relationship, are competitively altered as a result of the acts of one of the parties to that relationship, "substantial shortcomings detrimental" to the interests of the other party to the franchise relationship should properly be considered to have arisen, justifying a holding that the relationship has been terminated. Brattleboro Auto Sales, Inc. v. Subaru of New England, Inc., supra, at p. 12,368, fn 4.

> "No one can guarantee the outcome when competitive choices are between the demands of the assignee and the competing needs of the obligee. In such a case, even the risk of an

> unfavorable outcome, arising from the delegation, is not one which the law can force these dealers to take." Sally Beauty Company v. Nexxus Products Company, Inc., supra, at p. 1008.

II. Chevron's delegation of its franchise obligations directly resulted in the Petitioners' loss of explicit and remedial statutory rights and protections provided to them under state law.

As previously stated, Chevron was statutorily prohibited from operating gasoline stations with employees (i.e., "company operations") in Connecticut. C.G.S. 14-344a et seq. The Legislative history regarding Connecticut's enactment of this statute, and prohibition, makes it abundantly clear that the State Legislature perceived the unfairness and danger of supplier/landlords being in actual or threatened retail competition with dealers in

the petroleum industry.[32] As a result, the Legislature sought to remedy the situation, protect the dealers, and preserve fair competition by enacting the statute. When Chevron was the franchisor and supplier of the Petitioners, Chevron was nowhere in competition or threatened competition with them. Nor was there any incentive to eliminate franchises in order to convert to company operations. However, each of the Petitioners now finds himself in competition, or prospective competition, with his own supplier. Additionally, the new supplier

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[32] "These are the only people (i.e. the dealers) supplying energy in any way, shape, manner or form to the United States of America who show a willingness to compete on the basis of price and to pursue the principals of an open market. . . We're coming now as policymakers in the public sector in order to insure the kind of competitiveness, the kind of openness, a situation in which a tenant is not asked to compete with his or her own landlord in order to survive." Statement of State Senator Curry, E.R. p. 1617.

(Cumberland) is providing significantly more favorable product purchase and sale terms to its competing company operations, while dictating the competitive abilities of each of the Petitioners under the terms of its franchise agreements, and imposing significantly more onerous rental obligations upon the Petitioners in order to service the debt acquired as a result of this very transaction. In such a situation it is uncontradicted in the record that significant and on-going competitive harm to the dealers is assured.[33] Sally Beauty Company v. Nexxus Products Company, Inc., supra, at 1008.

While it is true that Chevron was in a position to attempt to exercise its discretion regarding many of these competitive factors, and contract terms and

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[33] E.R. 669-736 (Dealer Affidavits) and 752-771.

conditions, it was not a competitor of its own franchisees in Connecticut as is Cumberland.

The purpose and intent of the Legislature was to remedy precisely this type of situation. The right of the Petitioners to be free from franchisor competition, threatened competition, and threat of conversion to company operation, was an integral part of the contractual relationship which the Petitioners had with Chevron. Those contractual relationships included in their terms all rights and protections conferred upon these Petitioners under the laws of the State of Connecticut. N.C. Freed Co., Inc. v. Board of Governors of Federal Reserve System, 473 F.2.d 1210, 1215 (2d Cir. 1973), citing Von Hoffman v. City of Quincy, 4 Wall (71 U.S.) 535, 550, 18 L. Ed. 403 (1866). Those protections were available to

the Petitioners when they were Chevron franchisees. They were destroyed as a direct result of Chevron's delegation on June 1, 1986 to Cumberland.

III. A franchisor's assignment/delegation of its franchise obligations constitutes a non-renewal or termination of the petroleum franchise relationship under PMPA § 2802.

The provisions of PMPA are determinative of whether or not an "event" of non-renewal or termination has taken place. PMPA § 2801(14)(A) defines "non-renewal" as "a failure to reinstate, continue or extend the franchise relationship . . . at the conclusion of the term, or on the expiration date stated in the relevant franchise." Herein, Chevron delegated all of its franchise rights and obligations to Cumberland. Prior to doing so, Chevron notified each of the Petitioners that their

lease and supply agreements would not be renewed, and that Cumberland would assume Chevron's obligations under those agreements. The renewal provisions of PMPA address the renewal of the relationship between the parties rather than the specific rights or obligations of the parties under the franchise agreement.[34] Therefore, even if the franchises remained intact following the alleged "assignment" from Chevron to Cumberland Farms, the franchise relationship between Chevron and each of the Petitioners has clearly ended. Barnes v. Gulf Oil Corp., 795 F.2d 358, 362 (4th Cir. 1986); Chestnut Hill Gulf, Inc., et al. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., D.C. Mass., No. 86-3519-Mc Memorandum and Order of October 13, 1988, pp. 4-5; Florham Park

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[34] Senate Report No. 731, 95th Cong. 2d Sess. 30 (1978).

Chevron, Inc., et al. v. Chevron U.S.A., Inc. and Cumberland Farms, Inc., CCH Bus. Fr. Gde. para. 9011, pp. 18,418- 419 (D. N.J. 1987).

The District Court herein, however, held that the legitimacy of Chevron's claimed PMPA "market withdrawal" was irrelevant because of the validity of Chevron's assignment, which the District Court erroneously found. B-41(a). The District Court's Opinion (as affirmed by the Court of Appeals) ignores the undisputed fact that the franchise relationship between Chevron and each Petitioner ended on June 1, 1986. The facts are not only conclusive in this regard, but Chevron admits that its relationship with each of the Petitioners ended on or about June 1, 1986 in its non-renewal/termination notices, and in its letters to the Petitioners following its delegation to Cumberland. Ignoring this fact, the Courts

below refused to determine whether or not the franchises of the Petitioners had been renewed or terminated pursuant to an allowable "event" as prescribed under the PMPA.

IV. The numerous conflicting Federal District and Appellate Court decisions on the issue of whether a petroleum franchisor's assignment/delegation of its obligations to its franchisees constitutes a non-renewal or termination of the franchise relationship has created confusion, and threatens to undermine the uniformity which Congress sought.

In enacting PMPA, Congress sought to adopt uniform standards applicable to petroleum franchise terminations and renewals. Senate Report at 877; Darling v. Mobil Oil Corp., 864 F.2d 981, 984 (2d Cir. 1989). As a result of Chevron's purported assignment and "market withdrawal" from the northeast,

numerous Chevron franchisees instituted litigation within the First, Second, Third and Sixth Circuits. These cases have led to directly contradictory holdings on the issue of whether or not Chevron's actions constituted PMPA franchise terminations or non-renewals.

Chestnut Hill Gulf, Inc., et al. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., supra, (D. Mass.), considering exactly the same facts and circumstances applicable to this case, holds that the PMPA, and its legislative history, requires a holding that Chevron's actions constitute an event of non-renewal. In the case of Bruce Smith, et al. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., C.A. No. 87-1051 (W.D. Pa., August 15, 1988),[35] once again considering exactly the

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[35] Report and Recommendation of Magistrate (thereafter adopted as the opinion of the Court September 16, 1988).

same facts and circumstances applicable to this case, the Court held:

> ". . .that where a franchisor determines to withdraw from the market and, in accordance with its three options, chooses to sell the leaseholds to a third party, even if the sale is a valid assignment under state law, it is not a mere assignment within the meaning of the PMPA, but is a termination or non-renewal of the franchise relationship, and a cause of action will lie if the withdrawal is not accomplished in accordance with the provisions of the PMPA." Magistrate's Report and Recommendation at 11. (Emphasis added.)

Once again examining precisely the same facts and circumstances, the District Court of New Jersey held that PMPA non-renewals had occurred. Florham Park Chevron, Inc. et al. v. Chevron U.S.A., Inc. and Cumberland Farms, Inc., supra.

In the Second Circuit alone there are divergent opinions. In the case of Cedar Brook Service Station, Inc. et al. v. Chevron U.S.A., Inc. and Cumberland Farms, Inc., C.V.

86-4240 (E.D. N.Y., June 5, 1989), the Court held that, as a matter of law, Chevron's decision to withdraw from retail marketing in the northeast led to a non-renewal of the petroleum franchises in question. Further, that such a PMPA non-renewal event had occurred whether or not the franchises were validly assigned to Cumberland pursuant to state law. Opinion at 15-16.

These holdings are obviously in direct contradiction to the holdings of the District Court (see B-71a through 73a) and Second Circuit in this case, which conclude that the validity of Chevron's purported assignment/delegation to Cumberland forecloses any need to determine whether or not Chevron's non-renewal/termination of the franchises was valid under the standards of PMPA. B-41(a). The Second Circuit's affirmation of the Connecticut District

Court's Opinion in this regard therefore would apparently also be in direct conflict with the Opinion of its own Eastern District in Cedar Brook, supra.

The Sixth Circuit's Opinion in May-Som Gulf, Inc. v. Chevron U.S.A., Inc. and Cumberland Farms, Inc. (869 F.2d 917 (1988)) also holds that proper grounds under PMPA must exist for a valid petroleum franchise termination or non-renewal to occur. Both Cumberland and Chevron argued before the District Court for the Western District of Pennsylvania (Smith, et al. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., supra) that the Sixth Circuit's Opinion in May-Som stood for the proposition that the termination and non-renewal standards of PMPA would not be applicable if a valid franchise assignment from Chevron to Cumberland had occurred. The District Court rejected

Chevron's and Cumberland's arguments in this regard.[36]

In a virtually identical situation, the Fourth Circuit has held, in Barnes v. Gulf Oil Corp. et al., 795 F.2d 358 (1986), that neither a petroleum franchisee nor a franchisor may frustrate the PMPA statutory rights of the other by an assignment. Barnes, supra, at 362-363.

To the contrary, however, in McGee v. Gulf Oil Corp., (N.D. Ala. 1985) CCH Bus. Fr. Gde. para. 8379, and Aldrich v. Amoco Oil Company (S.D. Iowa 1985) CCH Bus. Fr. Gde. para. 8322, District Courts have held that a franchisor's assignment of franchise performance obligations is not a PMPA event of non-renewal or termination.

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[36] Report and Recommendation of the Magistrate at 10-11. The District Court herein adopted those same arguments. B-71(a) - 73(a).

Confusion on this critical issue is therefore spread throughout the Circuits. However, each of the Courts reaching determinations relative to Chevron's dealings with Cumberland in the northeast have concluded that Chevron's actions constitute a PMPA non-renewal. The sole exception is the Connecticut District Court, and the affirming Opinion of the Second Circuit Court of Appeals, which contradicts the holding of the Eastern District of New York within the same Circuit.

Other Appellate and District Courts reviewing the issue have reached significantly differing results.

A conclusive determination of whether or not the remedial standards of PMPA are applicable to the assignment of petroleum franchises nationwide, which large scale assignments are expected to continue unabated

into the future, is needed in order to effectuate Congress' intended uniformity, and to provide guidance to franchisors and franchisees in the future.

V. Chevron's actions cannot be held to constitute a valid PMPA "market withdrawal".

Because of improperly concluding that a valid assignment of Chevron's performance obligations to the Petitioners had occurred, and that such a conclusion precluded the need to examine whether or not the termination/non-renewal provisions of the PMPA had been satisfied by Chevron, neither the District Court nor the Court of Appeals reviewed the validity of Chevron's non-renewal/termination of the Petitioners' franchises under PMPA.

Chevron's invalid assignment/delegation clearly resulted in a termination of the Petitioners' franchises on June 1, 1986.

Barnes v. Gulf Oil Corp., supra at page 363; May-Som Gulf, Inc. v. Chevron U.S.A. Inc., et al., supra. In the face of such an invalid delegation, and resultant termination of the Petitioners' franchises, Chevron must prove that its termination on June 1, 1986 was permissible under the PMPA as a "market withdrawal".[37] Chevron is unable to prove that it conducted a "market withdrawal" because:

1) Such a market withdrawal has not actually occurred;

2) Chevron failed to comply with PMPA's notice provisions.

Before it completed its transaction with Cumberland on June 1, 1986, Chevron was marketing its gasoline through franchisees, including the Petitioners, in Connecticut.

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[37] Chevron bears the burden of proving that it has complied with PMPA's termination standards. PMPA § 2805(c).

Sales of its gasoline were being made under the Chevron or Gulf trademarks. Following the completion of its transaction with Cumberland, and pursuant to the existing Product Sales Agreement[38], Chevron supplies gasoline to Cumberland Farms, and allows Cumberland to market that gasoline under Chevron's "Gulf" trademark. Cumberland then supplies the same Gulf brand gasoline which it has purchased from Chevron to Cumberland's company owned and operated retail outlets for sale to the public at retail under the Gulf tradename, for Cumberland's own account. The relationship between Chevron and Cumberland is unequivocally one of a petroleum franchise as defined under PMPA § 2801. C-83a - 85a. Cumberland's retail sale of the Gulf gasoline it obtains from Chevron is made from "marketing premises" (i.e., Cumberland's

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[38] E.R. pp. 992, et seq.

retail outlets) as that term is defined in PMPA § 2801(a). Cumberland is also a "retailer" as that term is defined under PMPA § 2801(7).

PMPA's market withdrawal provisions allow for franchise termination only where a franchisor validly elects ". . . to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located. . .". PMPA § 2802(b)(2)(E); C-86a - 88a. Therefore, Chevron is, as a matter of law, unable to meet its burden of proving that it has factually conducted a market withdrawal as that process is defined under the PMPA. Simply put, Chevron's relationship to the distribution of Gulf gasoline within the State of Connecticut after June 1, 1986, has not changed at all. The only thing that has changed in

Connecticut is the identity of Chevron's franchisees. Cumberland is now Chevron's franchisee selling Chevron gasoline through retail outlets within the State of Connecticut rather than the Petitioners. No market withdrawal has therefore taken place.

Congress also set out specific written notice provisions when PMPA franchisors intended to terminate or non-renew their franchisees. Contrary to the general ninety (90) day notice provision for termination and non-renewal within PMPA,[39] Congress intentionally extended the notice period to one hundred and eighty days (180) where a franchisor intends to terminate or non-renew franchisees because of an intended market withdrawal. PMPA § 2804(b)(2). C-89a. Chevron must show that it has strictly complied with the notice provisions of PMPA.

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[39] PMPA § 2804(a). C-88a.

Walters v. Chevron U.S.A., Inc., 476 F. Supp. 353, 355 (N.D. Ga. 1979) aff'd 615 F.2d 1135 (5th Cir. 1980). Herein, Chevron provided the Petitioners with notice of its intended assignment and market withdrawal on February 14 and March 10, 1986. Chevron then completed its transaction with Cumberland on June 1, 1986. It is indisputable that the completion of Chevron's transaction with Cumberland on June 1, 1986, and its assignment/delegation of the Petitioners' franchises, was the event that constituted and completed Chevron's alleged "market withdrawal" under the PMPA. However, the "event" of market withdrawal occurred only one hundred and five (105) days after Chevron's PMPA notice of February 14, 1986, to the Petitioners. Chevron's failure to provide PMPA's required one hundred and eighty (180) day prior written notice before

the actual occurrence of the event of termination on June 1, 1986, renders its "notice" letters fatally defective. Walters v. Chevron U.S.A., Inc., supra.[40] Therefore, although the Courts below failed to review the issue relating to the validity of Chevron's claimed "market withdrawal", the record below is conclusive, and to the effect that Chevron cannot meet its burden of proving that it has complied with the market withdrawal provisions of PMPA.

Therefore, Chevron's invalid delegation resulted in a termination of the Petitioners'

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[40] The content of Chevron's termination notices to the Petitioners is also insufficient. Rather than stating that the Petitioners' franchises are to be terminated or non-renewed, the notices specifically state that the franchise relationships are not being terminated or non-renewed. Additionally, no specific date for the occurrence of the "event" of termination or non-renewal is set forth. Mobil Oil Corp. v. Vachon, 580 F. Supp. 153, 158 (D. Mass. 1983).

franchises on June 1, 1986. Since the termination of the Petitioners' franchises did not comply with any of the termination or non-renewal grounds sanctioned under the PMPA, the right of the Petitioners to be free from such impermissible terminations has been violated.

VI. The construction of the state statutory definition of "franchise" by the Courts below would improperly have the effect of rendering the remedial state statute a practical nullity.

The Petitioners have advanced the additional claim that, even if Chevron's assignment/delegation is valid, and the alleged market withdrawal is valid, Cumberland's attempt to renew the franchise relationships of each of the Petitioners was untimely under Connecticut law. Lasko v. Consumers Petroleum of Connecticut, Inc., 547

F. Supp 211 (D. Conn. 1981). The District Court held that, since the Petitioners were not "franchises" under Connecticut law, the automatic renewal provisions of the statute did not apply.[41] The Courts below held that, under Connecticut General Statute 42-133k, the Petitioners were required to show that they were selling gasoline ". . . under a marketing plan or system prescribed in substantial part by a franchisor . . ." B-41(a) et seq.

However, the explicit statutory language of Connecticut General Statute 42-133k(b) states:

> ". . . and includes any agreement between a manufacturer, refiner or producer, and a distributor,

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[41] The automatic renewal claims of the Petitioners were advanced in District Court No. 87-370 ("Ackley II") and District Court No. 87-716, Cohn v. Cumberland Farms, et al. Ackley II and Cohn were consolidated with Ackley I for the purposes of the District Court and Court of Appeals actions.

> wholesaler, or jobber, between a manufacturer, refiner or producer and a retailer, or between a distributor, wholesaler, jobber and a retailer." (emphasis added).

The statutory definition of "franchise" set forth by the Connecticut Legislature includes within its intended coverage the specific relationships of retailer and refiner (Chevron-Petitioners) and distributor-retailer (Cumberland-Petitioners). The Courts below have ignored the Legislatively intended specific inclusionary language in the statute. The statute's reference to "marketing plan" in the first portion of the statute is intended to make it clear that other types of relationships may be considered franchises, in addition to the specifically listed relationships in the final clause of § 42-133k(b) if a marketing plan associated with a trademark exists. The Connecticut Supreme Court is in full accord.

Muha v. United Oil Company, 180 Conn. 720, 729 (1980). Therein the Court stated that the amendment to include the specific inclusionary language of the statute was intended to create substantive rights and was not meant "merely as clarifying or interpreting the scope of the definitions in 42-133e(b) and (c) as originally enacted."

The holding of the Courts below has had the effect of improperly nullifying the intended and remedial application of a state statute to the petroleum franchise relationship. Under the facts herein, if the Petitioners are not franchisees within the meaning of the statute, virtually no petroleum franchisees would be covered by the Connecticut Act.[42]

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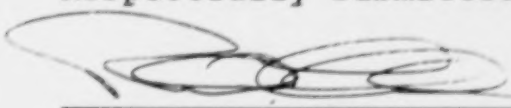
[42] See, in this regard, the uncontradicted affidavit of C. Matties, E.R. pp. 737-751.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that a Writ of Certiorari be granted.

Dated this 14th day of February, 1990.

Respectfully submitted,



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89-1339

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

FRANK ACKLEY
D.B.A. VILLAGE SQUARE CHEVRON, ET AL.,

Petitioners,

v.

GULF OIL CORPORATION,
CHEVRON U.S.A., INC., and
CUMBERLAND FARMS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

A P P E N D I X

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TABLE OF CONTENTS

Page

APPENDIX A:

Opinion of the United States Court of Appeals for the Second Circuit (November 27, 1989) . . . . . (1a)

APPENDIX B:

Ruling on Cross-Motions for Summary Judgment of the United States District Court for the District of Connecticut (May 5, 1989) . . . .(82a)

APPENDIX C:

Relevant Excerpts from the Petroleum Marketing Practices Act . . . . . .(83a)

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 266—August Term, 1989

(Argued: October 31, 1989

Decided: November 27, 1989)

Docket No. 89-7563

FRANK ACKLEY, dba VILLAGE SQUARE CHEVRON, ROBERT A. BLOSIO, dba LONG RIDGE CHEVRON, INC., JAMES D. CHAYKA, dba HOME GULF SERVICE, INC., ROBERT COHN, dba FAIRPORT GULF, VINCENT CONDITO, dba VINNY'S COURTLAND SERVICE, GEORGE S. LOMBARDO, JR., dba AVON CHEVRON SERVICE, INC., PAUL A. MORELLO, SR., dba MORELLO'S GULF/MORELLO'S SERVICE STATION, DOUGLAS SCHLEY, dba FAIRFIELD GULF, JOHN J. TODD, III, dba DANBURY GULF, INC., GEORGE WILLIAMSON, dba GEORGE WILLIAMSON AUTO ELECTRIC, INC., THOMAS S. ZAWATSKI, dba COS COB GULF, DAVID MAGUIRE, dba AL & BILL'S GULF SERVICE, INC., KENNETH CERRITELLI, dba CERRITELLI CHEVRON SERVICE, INC., SANTO J. CIARCIA, dba GLASTONBURY CHEVRON, DONALD HAVILAND, dba CHEVRON CAR WASH OF NEW CANAAN and FREDERICK O'NEIL, dba CHEVRON CAR WASH,

Plaintiffs-Appellants,

—against—

GULF OIL CORPORATION, CHEVRON U.S.A., INC., and CUMBERLAND FARMS, INC.,

Defendants-Appellees.

Before:

MINER and MAHONEY, *Circuit Judges*, and LASKER, *District Judge.**

Appeal from summary judgment entered in United States District Court for the District of Connecticut (Burns, *Ch.J.*) in favor of defendants in action brought by service station operators under provisions of the Petroleum Marketing Practices Act.

Affirmed.

RICHARD W. FARRELL, Esq., Stamford, Connecticut (Farrell & Barr, Stamford, Connecticut, of counsel), *for Plaintiffs-Appellants.*

RICHARD M. REYNOLDS, Esq., Hartford, Connecticut (Scott P. Moser, Esq., James Sicilian, Esq., Steven M. Greenspan, Esq., Day, Berry & Howard, Hartford, Connecticut, and Robert P. Taylor, Esq.,

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* Hon. Morris E. Lasker, Senior United States District Judge for the Southern District of New York, sitting by designation.

Pillsbury, Madison & Sutro, San Francisco, California, of counsel), *for Defendants-Appellees Gulf Oil and Chevron.*

PAUL D. SANSON, Esq., Hartford, Connecticut (James B. Pomeroy, Esq., Mark P. Anderson, Esq., Shipman & Goodwin, Hartford, Connecticut, and Mark G. Howard, Esq., Associate General Counsel, Cumberland Farms, Inc., of counsel), *for Defendant-Appellee Cumberland Farms.*

Dimitri G. Daskalopoulos, Esq., Washington, D.C., *filed a brief for amicus curiae Service Station Dealers of America.*

Nathaniel J. Nazareth, Esq., North Kingstown, Rhode Island (Rogers & Nazareth, North Kingstown, Rhode Island), *filed a brief for amicus curiae Connecticut-Rhode Island Gasoline Retailers & Garage Owners Association, Inc.*

PER CURIAM:

Plaintiffs-appellants, fourteen Connecticut service station operators (hereafter the "Dealers"), appeal from a summary judgment of the United States District Court for the District of Connecticut (Burns, *Ch.J.*) in favor of defendants-appellees Gulf Oil Corporation, Chevron U.S.A., Inc., and Cumberland Farms, Inc. In three separate actions, later consolidated, the Dealers alleged claims

grounded in violations of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2841 (1982) (hereafter "PMPA"), and pendent state law claims. They challenge the transfer to Cumberland Farms of their franchise agreements with Chevron, arguing that the assignment was invalid under the PMPA and under Connecticut law. First, they argue that the assignment effected a termination of the franchises within the meaning of the PMPA, since it substantially altered the franchise relationship and was thus invalid under the Uniform Commercial Code, *see* Conn. Gen. Stat. Ann. § 42a-2-210 (West 1960). Second, they contend that they are entitled to the right of first refusal to purchase the properties under section 2802-(b)(2)(E)(iii) of the PMPA. Third, they assert that defendants' actions violated the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. Ann. §§ 42-110a to -110q (West 1987). Fourth, they argue that their franchises were automatically renewed under Connecticut law, *see* Connecticut Petroleum Franchise Act, Conn. Gen. Stat. §§ 42-133j to -133n (West 1987), and that Cumberland's imposition of significant rental increases violated the PMPA and state law.

All these arguments were rejected in the comprehensive and well-reasoned opinion of Chief Judge Ellen Bree Burns. *See Ackley v. Gulf Oil Corp.*, ____ F. Supp. ____ (D. Conn. 1989). We affirm substantially for the reasons given in that opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FRANK ACKLEY d/b/a Village Chevron, ET AL	:	
	:	CIVIL NO. B-86-402(EBB)
v.	:	CIVIL NO. B-87-370(EBB)
GULF OIL CORPORATION, CHEVRON U.S.A., INC. and CUMBERLAND FARMS, INC.	:	
	:	
ROBERT A. COHN/R.A.C. CAR SERVICE, INC.	:	
	:	CIVIL NO. B-87-716(EBB)
v.	:	
GULF OIL CORPORATION, CHEVRON U.S.A., INC., and CUMBERLAND FARMS, INC.	:	
	:	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs, seventeen Gulf Service station dealers, bring these actions challenging the transfer of their service station franchises from Chevron to Cumberland Farms. In their complaints in

the three above-captioned consolidated cases, plaintiffs allege violations of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806, the Connecticut Petroleum Franchise Act ("CPFA"), C.G.S. §§ 42-133j - 42-133n, and the Connecticut Unfair Trade Practices Act ("CUTPA"), C.G.S. § 42-110 et seq. Jurisdiction rests upon 15 U.S.C. § 2805(a) and 28 U.S.C. §§ 1331, 1332, 1337, 2201 and 2202.

Pending before the court are cross-motions for summary judgment. For the reasons set forth below, plaintiffs' motions are denied and defendants' motions are granted on all counts.

I.

In 1984 Chevron U.S.A., Inc. ("Chevron") acquired the assets of Gulf Oil Corporation ("Gulf") for a purchase price of $13.2 billion. As a result of the

acquisition, Chevron owned the seventeen service stations leased by the plaintiffs in the present action and contracted a corporate debt exceeding $15 billion. To reduce the accumulated debt Chevron initiated several studies to determine which of its assets, including those acquired from Gulf, might be appropriate candidates for sale. In the fall of 1985, Chevron solicited bids for the purchase of its retail operations in the ten New England and mid-Atlantic states. Cumberland Farms, Inc. ("Cumberland") submitted the successful bid.[1]

On December 19, 1985, Chevron and Cumberland executed an Asset Purchase Agreement ("Purchase Agreement") pursuant to which Chevron agreed to sell, transfer and assign to Cumberland its real property and leasehold interests in approximately

500 retail gasoline service stations, including all of its stations in Connecticut, 20 petroleum product distribution terminals, 320 tanker trucks and other vehicles, various warehouses and related Chevron and Gulf inventories and supply contracts for approximately 300 independent Chevron and Gulf jobbers[2] and dealers in the northeast market ("Chevron sale" or "Chevron transaction").[3] The sale was allegedly structured to protect the continuity of dealer leases and supply contracts under the Gulf and Chevron trademarks. Section 2.5 of the Purchase Agreement expressly required Cumberland to assume all of Chevron's contractual commitments, including its trademark agreements, dealer leases and fuel supply agreements. Section 8.6 of the Agreement further required Cumberland, as franchise

agreements came up for renewal, to "offer in good faith . . . a new 'franchise' on terms and conditions which are not discriminatory" to each current dealer.[4]

Chevron and Cumberland also entered into several ancillary agreements related to the Purchase Agreement, two of which deserve comment. First, Chevron and Cumberland executed licensing agreements for the Gulf and Chevron trademarks. Cumberland purchased the right to use and authorize the use of the Gulf trademark, design and indicia for a period of 15 1/2 years, at no royalty. Thereafter, Cumberland has the option to renew its Gulf trademark license for an unlimited additional period at an annual royalty of one million dollars. Cumberland also purchased the right to use the Chevron trademark for a "reasonable transition

period." According to the agreement, franchisees were given the right to continue the use of the Chevron trademark for the longer of the remainder of the term of their existing franchise agreements or two years.[5]

Second, Chevron and Cumberland executed an ancillary product sales agreement whereby Chevron agreed to supply Cumberland Farms with the entire gasoline output of Chevron's Philadelphia refinery. This supply, along with purchases under an output agreement with a Canadian refinery and purchases on the New York Harbor Spot Market, satisfy substantially all of Cumberland's needs for fuel in the northeast market.

On February 14, 1986, after the Purchase Agreement was signed but before the transaction closed on May 31, 1986,

Chevron notified all affected Gulf and Chevron branded dealers in the northeast market, including the plaintiffs, of the sale to Cumberland. The notice clearly evidenced that the transaction had been planned as an assignment, and explained to the dealers that:

> [A]ll of Chevron's agreements with Chevron and Gulf jobbers and dealers in the 10-state area will be assigned to Cumberland Farms. Cumberland Farms will assume all of Chevron's obligations to its Chevron and Gulf jobbers and dealers under those agreements.
>
> (Plaintiffs' Ex. B)

The letter further advised dealers that:

> Chevron does not believe that the sale to Cumberland Farms of Chevron's marketing assets in the Northeast and the assignment to and assumption by Cumberland Farms of Chevron's jobber and dealer agreements in that area triggers the PMPA or represents a termination or nonrenewal of your Dealer Contract of Sale, Service Station Lease (if any) and related agreements with Chevron ("dealer agreements"). Your dealer agreements with Chevron will be

> transferred to another supplier who will honor all of the terms and conditions of those agreements and will have the right to continue to authorize you to utilize the Gulf trademarks and brand name. You will retain all of your rights under the PMPA against Cumberland Farms, your new supplier.
>
> On the chance, however, that someone might later claim that this transfer involves a termination or nonrenewal that is subject to the PMPA, we are taking the precaution of giving you formal notice of nonrenewal of your dealer agreements in accordance with the PMPA. We wish to repeat that in fact your agreements with Chevron will continue in full force and effect and will be renewed by Cumberland Farms -- unless Cumberland Farms independently has grounds under the PMPA to terminate or not to renew those agreements.
>
> (Plaintiffs' Ex. B)

The February 14, 1986, notice indicated that existing franchise agreements between individual dealers and Chevron would expire as of the later of (i) 180 days after receipt of the notice, or (ii) the stated expiration date of the current term of each

agreement. On March 10, 1986, Chevron sent to all Gulf and Chevron dealers in Connecticut a second notice which modified the first notice in one respect. Specifically, the March 10, 1986, notice stated that the existing franchise agreements would expire one year after receipt of the notice or the stated expiration date of each agreement, whichever was later. The March 10, 1986, notice was also sent to the governor of the State of Connecticut.

The sale of Chevron's northeast marketing assets to Cumberland closed at midnight on May 31, 1986, for a purchase price of $250 million.[6] Beginning in February,, 1987, and pursuant to the terms of the assignment, Cumberland sent franchise renewal documents to the dealers whose Chevron leases were soon to expire.

Many of the proposed lease agreements contained substantial rent increases. According to the plaintiffs, the renewal documents imposed significantly increased burdens and responsibilities. Plaintiffs also challenge the presentation of the renewal documents as untimely.[7] Each of the dealers signed the new Cumberland Farms leases under protest, reserving his rights under federal and state law.

II.

A. Background

Presently pending before the court are cross-motions for summary judgment on claims asserted by the plaintiffs in three consolidated cases. Ackley, et al v. Gulf Oil Corporation, et al., B-86-402 (EBB) ("Ackley I"), relates generally to the transfer of the franchises from Chevron to Cumberland. Plaintiffs' complaint contains

four counts, the first three of which allege that: (1) defendants failed to provide plaintiffs a right of first refusal to purchase the properties under 15 U.S.C. § 2802(b)(2)(E)(iii) of the PMPA; (2) defendants improperly terminated or nonrenewed the plaintiffs' franchises under the PMPA; and (3) defendants' actions violate CUTPA. Count Four sets forth a general demand for relief. Plaintiffs have moved for summary judgment on the first, second and fourth counts of their complaint. Defendants have moved for summary judgment on all counts, claiming that judgment should be granted in their favor because:

(a) the PMPA does not apply to the transaction since no termination or nonrenewal occurred, but rather a valid assignment took place;

(b) alternatively, the PMPA requirements for a market withdrawal were satisfied, and

(c) defendants' actions did not violate CUTPA.

In the second action, Ackley, et al v. Gulf Oil Corporation, et al., B-87-370 (EBB) ("Ackley II"), plaintiffs challenge the new franchise agreements proposed by Cumberland. In three counts the complaint alleges that: (1) plaintiffs' franchises were automatically renewed under the Connecticut Petroleum Franchise Act, C.G.S. § 42-133j, et seq.; (2) Cumberland imposed significant rental increases in violation of the CPFA and the PMPA; and (3) defendants' actions violate CUTPA. Plaintiffs have moved for summary judgment on the first count of the complaint. Defendants have moved for summary judgment

on all counts on the basis that:

(a) the plaintiffs are not franchisees within the meaning of CPFA;

(b) Cumberland's proposed rent increases do not violate either CPFA or PMPA; and

(c) defendants' actions do not violate CUTPA.

The third action, Robert A. Cohn/R.A.C. Car Service, Inc. v. Gulf Oil Corporation, et al., B-87-716 (EBB) ("R.A.C. Car Service"), sets forth the same counts and seeks the same relief as Ackley II.

B. Standard of Review

Under settled principles of law, this court must grant a motion for summary judgment if no issue of material fact is genuinely disputed and the movant is entitled to judgment as a matter of law. Adickes v. S.H. Kress Co., 398 U.S. 144,

157 (1970); Fed. R. Civ. P. 56(a). "In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986) (Feinberg, C.J.), cert. den. 480 U.S. 932 (1987), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Thus, "on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried." Heyman v. Commerce & Industry Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975).

The Supreme Court has recently written that "[o]ne of the principal purposes of the summary judgment rule is to isolate and

dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." (footnote omitted) Celotex Corp. v. Catrett, 477 U.S. 323, 324 (1986).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-23.

The Court concluded that "Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and . . .designate specific facts showing that there is a genuine issue for trial." Id. at 324.

Likewise, in Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Supreme Court stated that:

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'

Matsushita, 475 U.S. at 586-87 (citations omitted) (emphasis in original).

III. DISCUSSION

A. Ackley I

The basic issue raised by the counts in Ackley I is whether Chevron's transfer of

the plaintiffs' franchises to Cumberland Farms violated the PMPA. Plaintiffs claim that the "attempted delegation" of Chevron's franchise duties to Cumberland substantially altered the nature of the franchise relationship, and was therefore invalid under state law Uniform Commercial Code ("U.C.C.") principles. Thus, according to the plaintiffs, Chevron's invalid delegation was an "event of termination" under the PMPA. Plaintiffs also allege that Chevron's purported "market withdrawal" under the PMPA is similarly invalid. (Plaintiffs' 9/30/88 brief, p. 30 et seq.)

Defendants, on the other hand, argue that the transfer of Chevron's assets to Cumberland was a proper and valid "assignment" under principles of Connecticut contract law. Defendants

submit that a proper assignment of a franchise is neither a termination nor a non renewal of the franchise under PMPA standards, and accordingly plaintiffs are not entitled to invoke provisions of that statute. In the alternative, defendants argue that, if a termination or nonrenewal did occur, then Chevron satisfied all of the statutory conditions required for a proper market withdrawal under the PMPA.

The court notes at the outset that in order to establish a claim under the PMPA, the plaintiffs must prove as a threshold matter a termination or nonrenewal of their franchise relationship within the meaning of the PMPA. § 2805(c). There can be no dispute that plaintiff franchisees bear the initial burden of proof on this issue.[8] If plaintiffs succeed in meeting their burden, the defendant franchisors then bear the

burden of establishing as an affirmative defense that the termination or nonrenewal was permitted under the Act. Lippo v. Mobil Oil Corp., 802 F.2d 975, 977 (7th Cir. 1986) cert. denied, 480 U.S. 918 (1987); Burns Bros., Inc. v. RMT Properties, Inc., 2 Bus. Fran. Guide (CCH) 8468, at 15,859 (D. Ore. 1985).

As the parties apparently agree, the PMPA provides that the validity or invalidity of an assignment of a franchise is determined by reference to applicable principles of state law. Section 2806(b) of the PMPA states:

> (b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

Pursuant to Section 2805(b), an assignment of franchise, properly executed under applicable provisions of state law, does not constitute a termination or nonrenewal under the PMPA. May-Som Gulf, Inc. v. Chevron U.S.A., No. 87-4085, slip op. (6th cir. March 9, 1989); McGee v. Gulf Oil Corp., 2 Bus. Fran. Guide (CCH) para. 8379 (N.D. Ala. 1985); Aldrich v. Amoco Oil Co., 2 Bus. Fran. Guide (CCH) para. 8322 (S.D. Iowa 1985).[9] On the other hand, if the assignment of a franchise is invalid under applicable sate law principles, then the termination and nonrenewal provisions of the PMPA may be invoked for the protection of the franchisee. Courts have ruled that an invalid assignment "constructively terminates" a PMPA franchise, thereby affording the dealer PMPA protections.[10]

The Sixth Circuit recently addressed the issue of the burden of proof faced by a franchisee attempting to establish that a franchisor invalidly assigned and thereby constructively terminated a franchise. In May-Som Gulf, Inc. v. Chevron, U.S.A., No. 87-4085, slip op. (6th Cir. March 9, 1989), the appellate court affirmed a summary judgment in favor of the defendants in an action brought by former Gulf dealers challenging Chevron's sale of its marketing assets in the State of Ohio to Cumberland Farms.[11] The court held that the transaction was a valid assignment which did not trigger the PMPA, and that, even if the transaction did involve a termination or nonrenewal, Chevron and Cumberland fully complied with the market withdrawal requirements of the PMPA. Specifically with regard to the burden of proof, the

Sixth Circuit held:

> [T]hat to sustain a claim, under the PMPA, that a franchisor assigned and thereby constructively terminated a franchise agreement, the franchisee must prove either: (1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises), and thus, violated the PMPA; or (2) that the franchisor made the assignment in violation of state law and thus, the PMPA was invoked. See Fresher, 846 F.2d at 45-47; Barnes, 795 F.2d at 362-64. See also Little Oil Co., Inc. v. Atlantic Richfield Co., 852 F.2d 441, 444 & n.5 (9th Cir. 1988) (examining and approving of the Fresher rational) (sic).
>
> May-Som, slip op. at 10-11.

The central focus, under both § 2806(b) and the May-Som analysis, is on the legal entity created by Congress known as the PMPA franchise. This legislative creation, defined by statute, is subject to special protections, and it is the invalid

assignment of a PMPA franchise that triggers the PMPA protections. Courts interpreting the statutory definitions of § 2801 have clearly stated that a PMPA franchise consists of three elements. These elements are: (1) the right to occupy leased marketing premises; (2) the right to sell motor fuel under a trademark owned or controlled by a refiner; and (3) the right to be supplied with that fuel. Barnes v. Gulf Oil Corp., 795 F.2d 358, 360 (4th Cir. 1986); Fresher v. Gulf Oil Corp., 846 F.2d 45, 46-47 (9th Cir. 1988). As stated by the Barnes court, the Act defines a franchise in terms of :

> "a contract to use the refiner's trademark, a contract for the supply of motor fuel to be sold under the trademark, and a lease of the premises at which the motor fuel is sold. See S. Rep. No. 731, supra, at 29; Brach v. Amoco Oil Co., 677 F.2d 1213, 1216 n.2 (7th Cir. 1982)."
>
> Barnes, 795 F.2d at 360.

The relevant issue, therefore, is the validity of the assignment of the three contractual components of the statutory franchise. Plaintiffs correctly note that this court's determination of the validity of the assignment is not limited to a single fact, but rather should include a complete examination of all facts and circumstances. Darling v. Mobil Oil Corp., 864 F.2d 981 (2nd Cir. 1988). Because an invalid assignment under state law results in a constructive termination under the PMPA, it is appropriate to view the assignment as a potentially terminating event and therefore apply an "objective" or "reasonableness" test from the perspective of a disinterested observer. Id. at 989-90. But the salient inquiry remains, for PMPA purposes, the validity of the assignment of the franchise, as opposed to

the assignment, be it valid or invalid, of other contractual rights and responsibilities between the parties.

Applying the first prong of the May-Som analysis, plaintiffs have not established that Chevron's assignment to Cumberland breached any one of the three statutory components of the franchise agreement. At the time of the transaction, Cumberland acquired the right to use and authorize the use of the Gulf trademark, with an option to renew indefinitely. Cumberland also acquired rights to the Chevron mark for a period at least as long as the longest assigned contract term. As part of the transaction, Cumberland also purchased the properties leased by the plaintiffs. Cumberland's agreement with Chevron to purchase the output of Chevron's Philadelphia refinery, coupled with

Cumberland's other dependable supply sources, evidences Cumberland's capability to supply fuel to its dealers.[12] In sum, the undisputed facts establish that at the time of the assignment Cumberland possessed or had acquired the necessary capability and contractual rights lawfully to fulfill all of Chevron's duties under the franchise agreements.

With respect to the second branch of the May-Som analysis, plaintiffs have failed to establish that the assignment of assets from Chevron to Cumberland violated applicable provisions of state law. Thus, the plaintiffs have not met their initial burden of proving the existence of a termination, nonrenewal or constructive termination under the PMPA.

The parties do not dispute that the validity of Chevron's assignment is

determined by reference to applicable provisions of Connecticut law. Connecticut law permits the assignment of contractual rights and the delegation of contractual duties. Latimer Point Management Corp. v. Anderson, 1 Conn. App. 310 (1984); Fletcher-Terry Co. v. Grzeika, 1 Conn. App. 422 (1984); Rosetti v. New Britain, 163 Conn. 283 (1972). Connecticut also follows the general rule that a lease is freely assignable absent some restriction on assignment contained in the lease. Latimer Point Management Co., supra, at 315; Restatement 2d, Property, § 16.2 and Comment d. There is no allegation in the present case that the assigned leases contained within their terms any restriction on assignment by the franchisor.

Because the franchise, by definition, includes a contract for the sale of motor fuel as one of its three components, the transaction is also governed by the Connecticut law of sales contracts. Connecticut has adopted § 2-210 of the Uniform Commercial Code, under which contracts for the sale of goods between a buyer and a seller are made assignable as follows:

> (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts reacquired by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.
>
> (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return

performance . . . .

C.G.S. § 42a-210.

On the basis of C.G.S. § 42a-2-210, plaintiffs argue that Chevron's assignment was not valid because (a) the plaintiffs have a substantial interest in having Chevron, as opposed to Cumberland, perform the duties required by the contract; (b) the assignment would materially change the plaintiffs' duties; (c) the assignment would materially increase the burden or risk imposed on the plaintiffs under the contract; and (d) Chevron's assignment would impair materially the plaintiffs' chance of obtaining return performance.[13] In support of these arguments, plaintiffs allege:

> 1. Since Cumberland is not a refiner, it may lose or choose, of its own accord, to discontinue use of the Gulf trademark;
>
> 2. Cumberland may compete directly with the plaintiffs in the

retail petroleum market;

3. Cumberland has imposed rental increases under renewal contracts that average 176%.

4. Cumberland, a competitor, controls the price and terms of gasoline deliveries;

5. Cumberland's ability to company-operate threatens the future existence of the plaintiffs' franchises; and

6. Chevron's assignment has reduced or destroyed the good will value of each of the plaintiffs' franchises.

(Plaintiffs' 11/7/88 brief, pp. 15-31).

Plaintiffs have not set forth sufficient evidence to support the legal theories on which they proceed. First, to a large extent plaintiffs' factual allegations simply are not relevant to a consideration of the validity of the assignment because the allegations do not relate to the unexpired term of the franchise that was assigned to Cumberland.

On May 31, 1986, Chevron assigned the unexpired terms of the plaintiffs' three-year franchises to Cumberland. Although the lengths of the assigned terms varied depending on each individual dealer's contract date, at the present time all of the assigned contracts have expired. Thus, plaintiffs' reliance on present or future occurrences to support their allegations of increased burdens or material changes resulting from the assignment are not relevant to the extent they fail to relate to the assigned contracts that have since expired. For example, plaintiffs argue that the significantly increased rent imposed by Cumberland pursuant to its current contracts with the dealers supports a finding that the Chevron to Cumberland assignment violated state law. (Plaintiffs' 11/7/88 brief, pp. 18-19).

Current rent figures, paid according to contracts executed after the expiration of the assigned contracts, simply are not relevant to a determination of the validity of the assignment under C.G.S. § 42a-2-210.

Second, even if the assigned contracts had not yet expired, plaintiffs' allegations are grounded more in speculation than factual evidence. For example, plaintiffs offer no factual support for their argument that Cumberland may lose or may choose to abandon its right to the Gulf trademark. The unsubstantiated allegation that Cumberland might lose or abandon a valued trademark at some future, unspecified time does not constitute an increased risk or material change in the plaintiffs' contractual rights. May-Som, slip op. at 11. Moreover, plaintiffs fail to recognize that any willful termination

by Cumberland of the Gulf trademark would itself constitute a PMPA violation entitling the plaintiffs to invoke the statutory protections at that time. Fresher, 846 F.2d at 47 (if, at some future time, the franchisor's assignee breaches any of the statutory components of the franchise agreement, the franchisees can then bring suit under the PMPA).[14]

Finally, to the extent that plaintiffs' allegations are relevant and not speculative, they are largely unsupported by factual evidence. Plaintiffs urge this court to hold the assignments invalid under C.G.S. § 42a-2-210 because Cumberland, as assignee, competed directly with the plaintiffs in the sale of retail petroleum. Although Cumberland undisputedly owns 57 convenience stores selling gasoline in Connecticut, as represented to this court,

none of the dealers in deposition testimony identified a Cumberland-operated station in his marketing area. (Defendant Cumberland's 10/21/88 brief, p. 14, n.5).[15]

Plaintiffs further argue that the fact that plaintiffs' supply and purchase price of gasoline was controlled by Cumberland, a competitor, establishes a distinct threat to the franchisees that did not exist in their relationship with Chevron. First, plaintiffs have not offered any proof that Cumberland failed to supply gasoline in any manner inconsistent with the franchisees' agreement with Chevron for the supply of motor fuel during the assigned contract period. Second, with regard to the purchase price of the gasoline, the court notes that the assigned contracts did not establish a specific price for the sale of the gasoline.[16] On the basis of similar

findings, the district court in May-Som held:

> "First, . . . [the dealers] allege that they must pay higher prices for motor fuel. However, the motor fuel supply contracts do not state a specific price at which fuel will be sold to dealers. The . . . [dealers] also argue that Chevron . . . provided gasoline at a lower price than that charged by competing oil companies, but [that] Cumberland does not. However, the price differential is not provided for in the supply contracts, and thus was not an obligation."
>
> May-Som, Bus. Fran. Guide (CCH) para. 9000, at 18,326 (footnotes omitted).

Even if the purchase price is relevant to a determination of the validity of the assignment of the franchises, plaintiffs still have not set forth facts to support a cause of action under C.G.S. § 42a-2-210. Under their agreements with Chevron, the franchisees purchased gasoline at Chevron's "dealer tank wagon" ("DTW") price. At the same time, Cumberland was selling gasoline

to its company-operated locations at "jobber rack" prices.[17] After the assignment, the plaintiffs continued to purchase gasoline, except now at Cumberland's DTW prices, and Cumberland continued to sell to its company-operated locations at jobber rack prices. Significantly, plaintiffs have not alleged or submitted any evidence to suggest that Cumberland charged the dealers higher prices for gasoline than were charged by Chevron during the pre-assignment period.[18] Absent such evidence, the fact that Cumberland's company-operated locations purchased gasoline at lower prices does not support a finding of "substantial interest," "material change," "increased burden or risk," or "material impairment" under the Connecticut statute.

In sum, plaintiffs have failed to submit evidence sufficient to establish a genuine issue of material fact. Resolving all ambiguities and drawing reasonable inferences against the defendants, the court concludes that the record taken as a whole could not lead a rational trier of fact to find for the plaintiffs. Defendants' motion for summary judgment is granted on all counts in Ackley I; plaintiffs' motion for summary judgment on Counts One, Two and Four is denied.

Because plaintiffs have failed to establish, as a threshold matter, a termination or nonrenewal sufficient to invoke PMPA provisions, the court need not consider defendants' affirmative defense of market withdrawal.

B. Ackley II and R.A.C. Service

Plaintiffs have moved for summary judgment on Count One of their Complaint both in Ackley II and R.A.C. Car Service, arguing that plaintiffs' franchise relationships with Chevron were automatically renewed as mandated by applicable provisions of the Connecticut Petroleum Franchise Act, C.G.S. § 42-133j et seq. ("CPFA"). Specifically, plaintiffs' claim that C.G.S. § 42-133l(c) provides that all franchises be for a term of at least three years and for continuing and successive terms of at least three years unless the franchise relationship is cancelled or terminated pursuant to applicable law. Plaintiffs cite Lasko v. Consumers Petroleum of Connecticut, Inc., 547 F. Supp. 211 (D. Conn. 1981) for the proposition that a petroleum franchise is automatically renewed for continuing and

successive three-year periods unless a PMPA nonrenewal or termination has been properly effectuated by a franchisor. (Plaintiffs' 8/26/88 brief, p. 32). According to the plaintiffs, because the defendants have improperly terminated or nonrenewed the plaintiffs' franchises under PMPA standards, the plaintiffs are entitled to a summary judgment requiring Gulf or Chevron to continue the original franchise relationships with each of the plaintiffs pursuant to the provisions of their prior franchise agreements.

Defendants oppose plaintiffs' motion and move for summary judgment on their own behalf on all counts of Ackley II and R.A.C. Car Service. Defendants' motion is based, inter alia, on the ground that the defendants are not franchisors under the statutory definition of C.G.S. § 42-

133k(b). The court concurs. Even if the plaintiffs' franchises were improperly renewed under the PMPA, the provisions of the CPFA do not apply, because plaintiffs have failed to establish that their franchises fall within the scope of the Connecticut statute. For the reasons stated below, plaintiffs' motion for summary judgment on Count One of Ackley II and R.A.C. Car Service, Inc. is denied. Defendants' motion for summary judgment is granted.

The definition of a franchise under the CPFA is set forth at C.G.S. § 42-133k(b). That section provides:

> (b) "Franchise" means an oral or written agreement or arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing motor vehicle fuels and oils and other related products and offering or selling services associated with such products and with gasoline service stations under a marketing plan or system

> prescribed in substantial part by a franchisor, provided nothing contained herein shall be deemed to create a franchisor-franchisee relationship between the grantor and grantee of a lease, license or concession to sell goods or services upon or appurtenant to the premises of the grantor, which premises are occupied by the grantor primarily for its own independent merchandising activities; and
>
> (2) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate, and includes any agreement between a manufacturer, refiner or producer and a distributor, wholesaler or jobber, between a manufacturer, refiner or producer and a retailer, or between a distributor, wholesaler or jobber and a retailer.
>
> (emphasis added.)

The statutory definition clearly envisions the existence of a "marketing plan" or "system" prescribed in substantial part by the franchisor. Absent evidence of such a

plan or system, the relationship is not a franchise within the meaning of the statute.

In determining whether the control exercised by a franchisor is sufficient to constitute a marketing plan or system, the court is bound to examine facts relevant to the parties' operational relationship. Relevant factors include the franchisor's control over hours and days of operation, advertising, financial support, auditing of books and inspection of premises, control over lighting, employee uniforms, prices, trade stamps, hiring and management training. Consumers Petroleum of Connecticut, Inc. v. Duhan, 38 Conn. Supp. 495 (App. Sess. 1982). Although there is no precise formula as to how many of such factors must exist before the control exercised by the manufacturer constitutes

a marketing plan or system under the terms of the statute, Sorisio v. Lenox, Inc., 701 F. Supp. 950, 960 (D. Conn.), aff'd 863 F.2d 195 (2d Cir. 1988), recent decisions of this court have failed to find statutory franchises on facts similar to the present one.

In Narumanchi v. Shell Oil Co., Civ. No. 83-544 (D. Conn. Nov. 24, 1986) (Mansfield, J., by designation) and Ross v. Shell Oil Co., 672 F. Supp. 63 (D. Conn. 1987), agreements between Shell and its franchisees were held not to constitute franchises within the meaning of § 42-133k(b). In Narumanchi, the court noted that the dealer hired his own employees and alone supervised the operations of the station. Although Shell representatives visited the station, they did not impose sales quotas or finance the plaintiff's

business. The court found that, according to the express terms of the agreement between the parties, the plaintiff operated independently and was therefore not a statutory franchisee, even though Shell retained rights with respect to the appearance of the station, training of the plaintiff, inspection of the station, credit cards, taxes, customer complaints, insurance, use of Shell uniforms, and indemnity with respect to claims arising out of operation of the station. Narumanchi at p. 4.

Ross is essentially indistinguishable from Narumanchi. Citing Duhan and Narumanchi, the court failed to find any facts "which plausibly indicate[d] the existence of a franchise relationship." 672 F. Supp. at 66. The agreement characterized Ross as an "independent

businessman" with complete freedom to set the retail price of gasoline and other products sold. The fact that Shell required the Ross station employees to wear prescribed uniforms and that the premises be illuminated adequately, did not, in the court's view, support a contrary result. Id. at 66.

Likewise, in the present case, the plaintiffs were individually responsible for the management, operation and marketing of their stations. Plaintiffs maintained complete authority to set the retail price of the various grades of gasoline and diesel fuel. They controlled the hours and days of operation of the station. Defendants had no voice in the hiring or firing of station employees, and did not require the employees to wear certain uniforms. Maintenance of books and

financial records was the dealer's responsibility, and the defendants did not audit or review the records. In short, the court has not been presented with evidence sufficient to constitute a "marketing plan or system prescribed in substantial part by a franchisor." Plaintiffs have failed to distinguisn the significant precedent in any meaningful manner. While the facts of this case may not be identical to previous cases, plaintiffs are clearly not statutory franchisees under the rule of Ross or Narumanchi.

Moreover, defendants' description of the plaintiffs as independent businessmen is confirmed by the language of the lease agreements. Article 5 of the Chevron lease agreement unequivocally states that the "Dealer is engaged in an independent business" and that "nothing herein

contained shall be construed as granting to Chevron any right to control Dealer's business or the manner in which the same is conducted." Similarly, Article 13 of the Gulf service station lease states:

> 13. None of the provisions of this Lease shall be construed as reserving to Lessor any right to exercise control over the retail outlet business and operations of the Lessee conducted upon the leased premises, or to direct in any manner how Lessee shall conduct his business. It is understood and agreed that Lessee is an independent businessman and that the entire control and direction of said activities shall be and remain in Lessee, and neither Lessee nor any other person employed by him shall be deemed or considered employees or agents of Lessor.

Significantly, the dealers' own uncontroverted deposition testimony confirms that the dealers' actual relationships with the defendants comported with the language of the leases (See, e.g., O'Neill depo., pp. 93-96, Morello depo.,

pp. 35-36, Williamson depo., p. 57, as excerpted in Defendant Cumberland's 9/30/88 brief, pp. 65-70).

On other grounds, plaintiffs argue that, even if the defendants did not prescribe a marketing plan or system, plaintiffs are franchisees within the meaning of the last sentence of the statutory definition, which reads in pertinent part ". . . and includes any agreement between a refiner . . . [or] distributor . . . and a retailer." § 42-133k(b)(2). On the basis of this language, plaintiffs contend that a "marketing plan is not required to be shown where agreements exist between a 'refiner' and a 'retailer.'" (Plaintiffs' 10/21/88 brief, p. 55). According to the plaintiffs, a review of the cases cited by the defendants indicates "that none of those decisions

ever considered the final sentence of § 47-133k(b)." (Plaintiffs' 10/21/88 brief, p. 56).

Five days after the filing of the plaintiffs' brief, this court in Aurigemma v. Arco Petroleum Products Company, Civ. No. H-85-683 (D. Conn. Oct. 26, 1988, reconsidered but not modified, Ruling on Motion to Reconsider (D. Conn. Jan. 31, 1989), had opportunity to consider the scope of the last sentence of § 42-133k(b). On the basis of that sentence, plaintiffs in Aurigemma had argued that a statutory franchisee could be established without proof of the existence of a marketing plan or system. The court disagreed, stating:

> This language does not excuse plaintiffs from establishing the elements which constitute a franchise. The last quoted language was added to prevent petroleum refiners from avoiding the embrace of the definition of franchise by dealing through intermediaries. See Muha v. United

> Oil Co., 180 Conn. 720, 729-30 & n. 5 (1980). Further, the finding of a franchise relationship has been held to be dependent upon proof of an existence and imposition of a marketing plan. See Consumers Petroleum of Connecticut, Inc. v. Duhan, 38 Conn. Supp. 495 (1982); Narumanchi v. Shell Oil Co., Civil No. N-83-544 (D. Conn. Nov. 24, 1986), Findings of Fact and Conclusions of Law; Ross v. Shell Oil Co., 672 F. Supp. 63 (D. Conn. 1987). Accordingly, plaintiff must prove the existence of a "marketing plan" in order to bring their agreement under the CFCFA as a franchise.

This court accepts the reasoning of Aurigemma, and concurs in its conclusion. Additionally, the court notes that a contrary holding would render everything but the last clause of § 42-133k(b)(2) meaningless.[19]

The court finds that the plaintiffs have failed to establish themselves as franchisees within the definition of CPFA. Accordingly, plaintiffs are precluded from availing themselves of the protections of

that statute.

C. Count Two

In Count Two of their complaint, plaintiffs claim that the "significant rental increases sought by, or imposed, by Cumberland on each of the plaintiffs are discriminatory, arbitrary and in bad faith and violative of the standards of both the PMPA and the Connecticut Fair Conduct in Franchising Act, C.G.S. 42-133j et seq."[20] The plaintiffs claim that the rental fees imposed violate Cumberland's internal rental computation "guidelines" (Complaint, para. 19), and discriminate significantly and substantially among the franchise offerings to each of the plaintiffs. (Plaintiffs' 10/21/88 brief, p. 42).

Defendants move for summary judgment on Count Two of plaintiffs' complaint, arguing

that the undisputed material facts establish, as a matter of law, that Cumberland offered, in good faith, non-discriminatory franchises to the plaintiffs. Cumberland submits that the rents charged plaintiffs are calculated pursuant to a mathematical formula applied uniformly to all dealer properties. Moreover, the defendants claim that the formula is similar to other rental formulas used in the petroleum industry. According to the defendants, plaintiffs' real complaint is not that the new rents are discriminatory or offered in bad faith, but that the rents are now determined based on a different formula, a formula that happens to result in increases that the plaintiffs would rather not pay. (Defendant Cumberland's 9/30/88 brief, p. 57.)

Section 2802(b)(3)(A) of the PMPA requires that changes or additions to the franchise relationship proposed by the franchisor at the time of renewal must result from determinations made in good faith and in the normal course of business.[21] The legislative history of the PMPA indicates the "good faith and normal course of business" test is a subjective determination. S. Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Admin. News 873, 896 (good faith test meant to preclude sham determinations; normal course of business test refers to franchisor's normal decisionmaking process). In cases involving the franchisor's business judgment or marketing strategy, Congress has instructed courts to avoid scrutinizing that decision. Darling v. Mobil Oil Corp,

864 F.2d 981, 990 (2d Cir. 1989); Palmieri v. Mobil Oil Corp., 682 F.2d 295, 296 (2d Cir. 1982). "Subjective good faith, i.e. a 'good heart' without evil intent, is all that the statute requires of franchisors." Munno v. Amoco Oil Corp., 488 F. Supp. 1114, 1120 (D. Conn. 1980). Accordingly, significant rent increases have been upheld absent evidence of lack of good faith. Meyer v. Amerada Hess Corp., 541 F. Supp. 321, 330 (D.N.J. 1982) (rental increases of over 300% upheld); Bellmore v. Mobil Oil Corp., 524 F. Supp. 850, 854 (D. Conn. 1981) (rental increase from $7,008 to $13,032, that would effectively drive dealer out of business, upheld); aff'd 672 F.2d 899 (2d Cir. 1981); Munno v. Amoco Oil Co. 488 F. Supp. 1114 (D. Conn. 1980) (rental increase of 200-300% upheld). As succinctly stated by the late Judge

Blumenfeld in Munno:

> [T]he legislative history suggests that courts have been directed to look to the franchisor's intent rather than to the effect of its actions. If it is only using proposed changes to the lease to disguise an illegal attempt to discriminate against the franchisee and thereby drive him from business, the court is empowered to interfere. If, on the other hand, a good faith application of a rental formula operates unreasonably in a particular case, the dictates of the marketplace alone will govern the transaction. This interpretation is completely in accord with the perceived abuse which Congress sought to rectify.
>
> Munno, 488 F. Supp. at 1119.

In the present case, there can be no dispute that many of the rent increases proposed by Cumberland represent significant and substantial increases.[22] Cumberland attributes the increases to the fact that previous rents remained substantially stable over a period of time, despite significant increases in the fair

market value of the leased property over that same period. (See Plaintiffs' 9/30/88 brief, pp. 7-8). Significantly, all rents, including those decreased as well as those increased, were calculated by Cumberland pursuant to the same, uniform mathematical formula. The computed rent is one-twelfth (1/12) of the sum of (a) an objective valuation of the fair market value of the property, multiplied by an eleven per cent (11%) rate of return on the value of the property, and (b) the taxes on the property. (Gordon Aff. para. 34). Stated Schematically,

$$\text{Monthly rent} = \frac{(11\% \times \text{Appraised Property Value}) + \text{taxes}}{12}$$

The Cumberland rental formula is similar to other rental formulas used in the oil industry. See Beirne v. Getty Petroleum Corp. CV 88-0668 (E.D. N.Y. June 17, 1988),

aff'd per oral opinion, 863 F.2d 45 (2d Cir. 1988). Furthermore, Cumberland has voluntarily phased in the new rent formula over the three-year period of the dealers' leases. (Gordon Aff. para. 35).

If a dealer believes that Cumberland's valuation of the premises is too high, a procedure is in place whereby the dealer may obtain his own valuation of the property and challenge the Cumberland valuation under Cumberland's Rent Review Program (Gordon Aff. para. 37). If Cumberland disagrees with the valuation proffered by the dealer's appraiser, Cumberland obtains another appraisal from an independent, certified appraiser. The dealer's appraisal and Cumberland's second appraisal are then averaged and that result is used in the rental formula.

There has been no representation brought to the attention of the court that any of the plaintiffs have availed themselves of the opportunity to challenge Cumberland's assessment of any station's rent under the Rent Review Program. Plaintiffs acknowledge the existence of the program, but dispute, without elaboration, that the program provides any meaningful alternative to the plaintiffs. (Plaintiffs' St. of Disputed Facts, 10/21/88, para. 29, p. 5.)

The objective rental formula and its uniform application, the phase-in period, appraisal procedures and Rent Review Program all constitute objective evidence of Cumberland's good faith. Despite voluminous filings and affidavits, plaintiffs have failed to produce any evidence establishing that the rent

increases deviated from Cumberland's established procedures or policies, or that the increases were used to disguise a bad faith attempt to harm the franchisees. Plaintiffs' conclusory allegations about Cumberland's evil motives do not defeat the defendants' motion for summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Absent evidence that the rental formula was employed by the franchisor in bad faith, summary judgment is appropriate. Munno v. Amoco Oil Co., 488 F. Supp. 1144, 1120-21 (D. Conn. 1980); Nesheiwat v. Mobil Oil Corp., Bus. Fran. Guide (CCH) para. 8283, at 14,941 (C.D. Cal. 1984 (issue of franchisor good faith does not preclude summary judgment where evidence fails to establish issue of material disputed fact).

Plaintiffs' CUTPA Claims

Plaintiffs' complaints in all three actions allege various violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), C.G.S. § 42-110a et seq. Plaintiffs' CUTPA claims are based on the same allegations that have formed the basis of their claims under the PMPA and CPFA. To the extent that plaintiffs' CUTPA claims are based on alleged violations of the petroleum statutes, in light of the court's ruling plaintiff's claims are now moot. Sorisio v. Lennox, Inc., 701 F. Supp. 950 (D. Conn.), aff'd 863 F.2d 195 (2d Cir. 1988). As a matter of law, plaintiffs have not established evidence of a CUTPA violation, and defendants' motion for summary judgment on these counts is granted.

IV. CONCLUSION

In conclusion, the court is not unsympathetic to the concerns and fears of the plaintiffs who, as small businessmen, witnessed the occurrence of a billion dollar transaction in which their franchises were assigned to a franchisor that, they believe, intends to take over their businesses. However, in the several hundred pages of legal memoranda submitted to the court, plaintiffs lost sight of the legal theories on which they proceed. Plaintiffs' conclusory allegations and lengthy factual dissertations, unsupported by evidence, do not serve to defeat defendants' summary judgment motions.

This is not entirely plaintiffs' fault. The PMPA never intended to apply to the major, national acquisition that plaintiffs challenge in this lawsuit. Rather,

Congress enacted the PMPA in order to establish "protection for franchisees from arbitrary or discriminatory termination or nonrenewal of their franchises." S. Rep. No. 95-731, 95th Cong., 2d Sess. 15 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 874. As noted by the court in Russo v. Texaco, 6309 F. Supp. 682 (E.D. N.Y. 1986), aff'd 808 F. 2d 221 (2d Cir. 1986):

> There is nothing in the language of the Act suggesting that a major national acquisition and large scale divestiture for bona fide business reasons was intended to be stymied by the right of individual franchisees to insist on a prior relationship on exactly its former terms. A permanent status quo in the relationships of major national oil corporations with each other was not mandated by Congress through the PMPA. In a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of franchisees as well as franchisors. Change may be required for survival.
>
> . . .
>
> The legislation recognized the

> "legitimate needs of a franchisor to be able to terminate a franchise based upon . . . changes in circumstances." S. Rep. No. 95-731, 95th Cong., 2d Sess. 18-19, reprinted in 1978 U.S. Code Cong. & Ad. News 873, 877. Congress expressly recognized "the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing marketing conditions and consumer preferences." Id. at 19, 1978 U.S. Code Cong. & Ad. News at 877.

Russo, 630 F. Supp. at 688-89.

For the reasons set forth in this opinion, defendants' motions for summary judgment on all counts are granted; plaintiffs' motions for summary judgment are denied.

SO ORDERED.

/s/
ELLEN BREE BURNS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven Connecticut, this 5th day of May, 1989.

1. Cumberland Farms is presently the third largest convenience store chain in the United States, operating over 1200 convenience stores. Approximately half of Cumberland's convenience stores also market motor fuel. (Ex. AA, Gordon depo., pp. 92-93). Cumberland owns approximately 57 convenience stores selling gasoline within Connecticut. (Ex. BB, Lauro depo. pp. 38-40). Cumberland is not a refiner of petroleum products. (Gordon Aff., para. 20).

2. The terms "jobber" and "distributor", as used in the petroleum business, are synonymous. Characteristically, the jobber maintains storage tanks for the sale of gasoline and other petroleum products to dealers and other large end users.

3. The Chevron employee with primary responsibility for the sale of the Northeast marketing assets was Irwin M. Lichtblau. (Lichtblau Aff., para. 7).

4. Section 8.6 adopts the language of Section 2802(b)(2)(E) of the PMPA, verbatim.

5. Nine of the plaintiffs purchased gasoline from Chevron pursuant to written product supply agreements for resale under the "Gulf" trademark. The other eight purchased gasoline for resale under the "Chevron" trademark. These eight have recently converted to the "Gulf" brand. Chevron's agreement with all eight expressly permitted Chevron to change the mark under which Chevron sold gasoline to the dealers. (Schmidt Aff., Tabs 2J-2Q).

6. The December 19, 1985, Asset Purchase Agreement listed a purchase price of $310,207,000. That price was reduced to $238,500,000 prior to closing to reflect a reduction in the estimated values of the inventories and accounts receivable. On June 2, 1986, Chevron sent letters to all Gulf and Chevron dealers in the Northeast advising that the sale to Cumberland had been completed. (Perkins Aff., para. 10; Ex. 7).

7. See Plaintiffs' Schedule A, attached to this decision.

8. Plaintiffs misconstrue the PMPA to the extent they argue that defendants bear the burden of proving the absence of a terminating event. (Plaintiffs'

10/21/88 brief, pp. 5, 7). § 2805(c) of the PMPA clearly states:

> (c) In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

9. In two cases involving the identical transaction at issue in this lawsuit, federal district courts have ruled that the assignment from Chevron to Cumberland constituted a nonrenewal of the franchise relationship between Chevron and the dealers, even if the assignment was valid under state law, because Chevron necessarily would not continue as a party to the relationship. Chestnut Hill Gulf, Inc.

et al v. Cumberland Farms, Inc., et al., No. 86-3519 (D. Mass. Oct. 13, 1988),1 and Florham Park Chevron, Inc. v. Chevron, et al., 2 Bus. Fran. Guide (CCH) para. 9011 (D.N.J. 1987). These rulings fail to recognize the very purpose of the assignment event, whereby one party assumes the contractual rights and responsibilities of another. Indeed, the whole point of assigning a franchise is to transfer the responsibility of the franchise relationship to the assignee.

This court declines to accept a rule that an assignment necessarily constitutes a terminating event because the assignor does not continue as a party to the franchise relationship. On the basis of § 2806(b), this court determines that the effect of the

assignment as a terminating event under the PMPA is determined by reference to state law. A contrary holding would render § 2806(b) meaningless.

Likewise, the court declines to adopt the reasoning and conclusion of the Magistrate's Opinion in Smith v. Cumberland Farms, D.N. 87-1501 (W.D. Pa., Sept. 16, 1988 Order adopting Mag.'s Report, dated Aug. 15, 1988). In Smith, the court found that the mere existence of 15 U.S.C. § 2802(b)(2)(E), the market withdrawal affirmative defense, means that, if a franchisor assigns a franchise and then withdraws from the market, the assignment does not constitute "a mere assignment within the meaning of the PMPA," but is necessarily a termination of nonrenewal. Smith, mag. op. at 11.

This reasoning fails to recognize that although the market withdrawal defense includes a wide range of conduct, some of which clearly does constitute a termination or nonrenewal, a market withdrawal does not necessarily constitute a termination or nonrenewal merely because of the existence of a market withdrawal defense.

10. The Second Circuit has not yet addressed what constitutes a "constructive termination" under the PMPA.

11. The May-Som case involved Chevron's sale to Cumberland of its motor fuel marketing assets in Ohio pursuant to agreements essentially identical to

those involved in the present case. (Lichtblau Aff. para. 25).

12. Plaintiff Robert Blosio, d/b/a Long Ridge Service, Inc., by affidavit (Plaintiffs' Ex. EEE) states that on November 25, 1988, he ordered quantities of both regular unleaded and super unleaded gasoline from defendant Cumberland and that only the regular unleaded gasoline was delivered with a note indicating Gulf/New Haven was out of super unleaded gasoline. He also avers he was told in a telephone conversation that the balance of his order would be dispatched on the evening of November 29, 1988. He does not, however, indicate the actual date of delivery of the product. On the basis of this one incident and the uncertainty as to how long Mr. Blosio

was without product, the court cannot find that Cumberland lacks, and at the time of the assignment lacked, the capability of supplying the dealers.

13. Plaintiffs also argue that Cumberland failed to use its "best efforts" to supply and promote the sale of the goods in question in violation of C.G.S. § 42a-2-306(2). (Plaintiffs' 9/30/88 brief, pp. 35-36). Plaintiffs have not established that the contract assigned was an exclusive dealing agreement as required by the statutory section. Even assuming the existence of a "constructive" exclusive dealing term in the contract, plaintiffs have not established that defendants did not use their best efforts to supply and promote the sale of the motor fuel.

14. It is true that PMPA § 2802(c)(6) permits Cumberland to terminate franchise relationships because of loss of its trademark, but that permission is lost if:

> ". . . such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor."

§ 2802(c)(6).

15. Cumberland's management has testified that it intends to expand and strengthen its network of independent Gulf dealers. (Gordon Aff., 39; Haseotes Aff., paras. 6-8). According to Cumberland, the fact that Cumberland operates service stations at some locations with its own employees does

not mean that Cumberland has any less interest than Chevron in being an effective supplier to dealer-operated stations. (Defendant Chevron's 10/21/88 brief, p. 3.)

16. Chevron's supply agreements with the franchisees who were Chevron dealers provided:

> The price Dealer shall pay Chevron for Chevron motor fuels hereunder shall be Chevron's posted price to its Chevron dealers generally at the time and place of delivery for the particular product, grade, quantity and type of delivery involved.

Chevron's supply agreements with the plaintiffs who were Gulf dealers provided:

> SELLER'S scheduled price in effect at time and for place of delivery.

17. The DTW price is generally five to seven cents higher than the jobber rack

price. (Plaintiffs' 9/30/88 brief, p. 20.)

18. Conn. Gen. Stat. §42a-2-305(2) provides that an "open price" provision requires only good faith on the part of the party who sets the price:

> "A price to be fixed by the seller or by the buyer means a price for him to fix in good faith."

19. Plaintiffs argue that their agreements with the defendants are characteristic of all agreements in the petroleum industry, and that a finding by this court that the plaintiffs are not franchisees within the meaning of the statute would essentially mean that no dealers are covered by the CFPA. This court is not inclined to make assumptions about industry standards, but, assuming the plaintiffs'

assertions are valid, plaintiffs' concerns are more appropriately directed to the state legislature.

20. As already noted, The Connecticut Fair Conduct in Franchising Act, previously referred to in this opinion as the CPFA, does not apply to the franchises in question. The court will consider plaintiffs' claim in Count Two under PMPA standards only.

21. In Count Two, plaintiffs allege that the increased rents proposed by Cumberland violate the PMPA standards, but they do not indicate the specific PMPA section to which they refer. The plaintiffs' opposition brief likewise offers no guidance.

22. The statistical evidence is represented differently by each party. Plaintiff

claims rental increases ranging from zero to seven hundred and sixty-one per cent. See Schedule B attached to Plaintiffs' 9/30/88 brief, listing the plaintiffs' individual increases as follows: Chayka, 159%; Lombardo, 130%; Zawatski, 17.2%; O'Neill, 224%; Ciarcia, 109%; Cohn, 333%; Cerritelli, 163%; Williamson, 52%; Todd, 150%; Montague, 0%; Blosio, 358%; Condito, 201%; Schley, 58%; MaGuire, 40%; Haviland, 761%; Morello, 62.5%.

Charts submitted by the defendants represent that the rental increases were not uniformly high, but varied from a high 167% to a low -18%. (Defendant Cumberland's 10/21/88 brief, p. 18 n.7, and attached schedules). Defendants claim that the average first-year rental increase for all of

the plaintiffs under the new formula was approximately 52%. Two plaintiffs allegedly experienced decreases in their rent of 13% and 22%, respectively. (See Gordon Affidavit, at 38; Defendant Cumberland's 9/30/88 brief, pp. 51 n.15). The defendant's charts are supported by sworn affidavits attesting to the accuracy of the computations.

APPENDIX C
Excerpts of Relevant Portions of the Petroleum Marketing Practices Act ("PMPA") 15 U.S.C. §§ 2801 et seq.

FRANCHISE PROTECTION

§ 2801. Definitions

As used in this title:

(1)(A) The term "franchise" means any contract -

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer . . .

(iv) between a distributor and a retailer, under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or the refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes -

. . .

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed -

(I) under a trademark owned or

controlled by a refiner . . .

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who -

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, . . .

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel . . .

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship -

> (A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise . . .
>
> (C) following a termination (on or after the date of enactment of this Act [enacted June 19, 1978]) of the relevant franchise which was entered into prior to such date of enactment and has not been renewed after such date . . .

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget . . .

(19) The term "State" means any State of the United States, . . .

§ 2802. Franchise relationship

(a) **General prohibition against termination or nonrenewal.** Except as provided in subsection (b) and section 103 [15 USCS § 2803(b)], no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may -

(1) terminate any franchise . . . prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) **Precondition and grounds for termination or nonrenewal.** (1) Any franchisor may terminate any franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]) or may fail to renew any franchise relationship, if -

(A) the notification requirements of section 2804 are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship: . . .

(E) In the case of any franchise entered into prior to the date of the enactment of this Act [enacted June 19,

1978], and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area in which the marketing premises are located, if -

(i) such determination -

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises -

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal

of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of a sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to the franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor . . .

§ 2804. Notification of termination or nonrenewal of franchise relationship

(a) **General requirements applicable to franchisor.** Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship -

(1) in the manner described in subsection (c); and

(2) except as provided in subsection (b), not less than 90 days prior to the date on which such termination or

nonrenewal takes effect . . .

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) . . . the franchisor shall -

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) **Manner and form of notification.** Notification under this section -

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain -

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect;

and

(C) the summary statement prepared under subsection (d) . . .

§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action. If a franchisor fails to comply with the requirements of section 2802, the franchisee may maintain a civil action against such franchisor . . .

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers. (1) In any action under subsection (a), the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802, including declaratory judgment, mandatory or prohibitive injunction relief, and interim equitable relief . . .

(c) Burden of proof; burden of going forward with evidence. In any action under subsection (a), the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b), and, if applicable, that such franchisor complied with the requirements of section 2802(d) . . .

§ 2806. Relationship of statutory provisions to State and local laws

(b) Nothing in this title authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise . . .

(3)

Supreme Court, U.S.
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No. 89-1339

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

FRANK ACKLEY d/b/a
VILLAGE SQUARE CHEVRON, ET AL.,
Petitioners,

v.

GULF OIL CORPORATION, CHEVRON USA, INC.
and CUMBERLAND FARMS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CUMBERLAND FARMS, INC. IN OPPOSITION TO THE PETITION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	8
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Ackley, et al. v. Gulf Oil Corp., et al., 889 F.2d 1280 (2d Cir. 1989) 12, 13, 14, 15

Aldrich v. Amoco Oil Company, 2 Bus. Fran. Guide (CCH) ¶8322 (S.D. Iowa 1985) 15

Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986) 12

Burns Brothers, Inc. v. RMT Properties, Inc. 2 Bus. Fran. Guide (CCH) ¶8468 (D. Ore. 1985) aff'd 805 F.2d 1039 (9th Cir. 1986) 15

Cedar Brook Service Station, Inc., et al. v. Chevron U.S.A., Inc., et al., CV-86-4240 (E.D.N.Y. June 5, 1989) 13, 14, 15

Chestnut Hill Gulf, Inc., et al. v. Cumberland Farms, Inc., et al., Docket No. 86-3519-MC (D. Mass. 1988) 13

Florham Park Chevron, Inc., et al. v. Chevron, U.S.A., Inc., et al., 2 Bus. Fran. Guide (CCH) ¶9011 (D.N.J. 1987) 13, 15

Fresher v. Shell Oil Company, 846 F.2d 45 (9th Cir. 1988) 12

May-Som Gulf Inc. v. Chevron U.S.A., et al., 869 F.2d 917 (6th Cir. 1989) 12, 13, 14, 15

McGee v. Gulf Oil Corp.,
2 Bus. Fran. Guide (CCH) ¶8379
(N.D. Ala. 1985) 15

Muha v. United Oil Co., 180 Conn.
720 (1980) 18

Smith, et al. v. Cumberland
Farms, Inc., et al., C.A. 87-1051
(W.D. Pa. Aug. 15, 1988) 13, 14

STATUTES

Connecticut Petroleum Franchise Act
C.G.S. 42-133j et seq. ("CPFA") 5, 6, 8, 19

15 U.S.C. §2801 et seq., the
Petroleum Marketing Practices Act
("PMPA") 4, 5, 6, 7, 8, 9, 10, 17

OTHER AUTHORITIES

13 Moore's Federal Practice ¶817.21 . . . 16

Harlan, Manning the Dikes
13 Record N.Y.C.B.A
541, 552 (1958) 16

Supreme Court Rule 10.1 9

Supreme Court Rule 12.5 . . . . . 2, 3

No. 89-1339

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

FRANK ACKLEY d/b/a VILLAGE
SQUARE CHEVRON, ET AL.,
Petitioners,

v.

GULF OIL CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CUMBERLAND FARMS,
INC. IN OPPOSITION TO THE PETITION

I. INTRODUCTION

Cumberland Farms, Inc. ("Cumberland")[1/] is submitting this brief in opposition

1/ There are no parent companies or subsidiaries (except wholly owned subsidiaries) of Cumberland.

to the petition for a Writ of Certiorari. In their petition, the petitioners set forth issues in their "Questions Presented for Review" which either have been mischaracterized or are not appropriate questions for review. In addition, the petitioners inaccurately describe the facts and prior case history in their "Statement of the Case," and devote most of their 59-page petition to arguing their case for a third time rather than presenting to this Court, with "accuracy, brevity and clearness," an understanding of the points requiring consideration. See Supreme Court Rule 12.5.[2/] Accordingly, Cumberland

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2/ Supreme Court Rule 12.5 provides:

> The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding

will present a short Counterstatement of the Case and will then briefly discuss each of the five "Questions Presented" and why they fail to set forth an adequate basis for the granting of the petition.

II. COUNTERSTATEMENT OF THE CASE

The three actions which are the subject of this petition were filed by the petitioners in the United States District Court for the District of Connecticut and were subsequently consolidated. The first action was filed on August 15, 1986 ("Ackley I"), the second action was filed on May 22, 1987 ("Ackley II"), and the third action was filed on October 26, 1987 ("R.A.C. Car Service").

(CONTINUED)

> of the points requiring consideration will be a sufficient reason for denying his petition. (Emphasis added).

On this basis alone, the petition should be denied.

The allegations in these consolidated cases relate to two general events. In Ackley I, the petitioners challenged the transfer of their franchises on May 31, 1986 from the respondent Chevron U.S.A. Inc. ("Chevron")[3/] to respondent Cumberland Farms, Inc. ("Cumberland"). This transfer occurred as part of Chevron's sale to Cumberland of all its marketing assets in the northeast (the "Chevron Transaction"). The petitioners alleged that there was neither a valid assignment of their franchises by Chevron to Cumberland nor a valid market withdrawal by Chevron under 15 U.S.C. §2801 et seq., the Petroleum Marketing Practices Act ("PMPA"). In Ackley II and R.A.C. Car

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3/ The Gulf Oil Corporation, which was acquired by Chevron in 1984, was also named as a defendant in these three cases and is a respondent in this petition.

Service, the petitioners challenged the new dealer agreements offered by Cumberland and, in particular, whether the new rents contained in those agreements violated the PMPA. The petitioners further claimed that they were franchisees under the Connecticut Petroleum Franchise Act C.G.S. §§42-133j et seq. ("CPFA") and that Cumberland failed to comply with the CPFA.

On September 30, 1988 the petitioners and respondents filed cross motions for summary judgment on all claims presented. The respondents moved for summary judgment in Ackley I on all counts claiming that judgment should be granted in their favor because: (a) the PMPA did not apply since no termination or nonrenewal of the petitioners' franchises occurred, but rather a valid assignment was accomplished; or (b) alternatively, the PMPA requirements

for a valid market withdrawal were satisfied.

In Ackley II and R.A.C. Car Service the respondents moved for summary judgment on all counts on the basis that either: (a) the petitioners were not franchisees within the meaning of the CPFA; or (b) Cumberland's proposed franchise agreements did not violate either the PMPA or the CPFA.

The district court held extended oral argument and on May 5, 1989 issued a 43-page opinion granting the respondents' motions for summary judgment. With respect to the issues raised in Ackley I, the court held that the PMPA was not applicable to the Chevron Transaction because the petitioners had failed to show that there had been either a "termination" or "nonrenewal" of their franchises, a prerequisite to any cause of action under

the PMPA. See Ruling on Cross Motions for Summary Judgment ("District Court Ruling"), reprinted in Petitioners' Appendix ("Pet. App.") at 41(a). Because the district court held that the PMPA was not invoked by the lawful assignment of Chevron's franchises to Cumberland, it did not rule on the respondents' alternative summary judgment claim that a valid market withdrawal was effectuated. Id. Having decided that there was a valid assignment by Chevron, the court also considered whether there was a proper renewal of the petitioners' franchises at the end of the assignment period and determined that there was. Id. at 57(a) - 63(a).

With respect to the issues raised in Ackley II and R.A.C. Car Service, the district court held that Cumberland offered the petitioners new franchises in good faith and in the normal course of its

business, and that the petitioners were not franchisees under the CPFA. Id. at 62(a) - 63(a). The court further granted summary judgment in all three cases on the CUTPA claims because they were based on the same allegations contained in the claims under the PMPA and the CPFA.

On November 27, 1989, the Second Circuit Court of Appeals affirmed the "comprehensive and well reasoned opinion" of the Chief Judge of the district court, granting the respondents' motions for summary judgment. It is from that ruling that the petitioners seek this Court's review.

III. ARGUMENT

The petitioners claim there are five questions which are presented for review. A cursory review of these questions reveals that only one of them -- the second one

which incorrectly suggests there is a conflict among the circuits -- even arguably presents the "special and important reasons" necessary for review.[4/] This second question, however, as presented in the petition, is grossly misleading and there is, in fact, no conflict among the circuits.

The first question proposed by the petitioners is whether a franchisor's delegation of franchise rights and obligations results in a nonrenewal or termination of a franchise relationship under the PMPA. The PMPA explicitly states, however, that this question is not

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4/ Rule 10.1 of this Court expressly states that a petition "will be granted only when there are special and important reasons therefor." While this rule is not intended to be exhaustive, the five questions put forth by the petitioners do not in any way raise the kind of issues provided as examples in that Rule.

one to be decided under the PMPA but rather to be decided under state law. As the petitioners concede, §2806(b) of the PMPA expressly provides that transfers or assignments are neither authorized nor prohibited by the PMPA but instead are "to be determined by reference to applicable state law." Pet. Br. at 27 (emphasis in original). Thus, neither the PMPA nor any federal statute is even at issue with respect to this question.

In addition, the district court's ruling on this issue was based on the specific facts relating to this particular transfer from Chevron to Cumberland. Contrary to the claim by petitioners that the issues in this case are of "critical importance" to hundreds of thousands of franchisees or even approximately 90,000 petroleum franchises (Pet. Br. at 5), the rulings by the courts below are restricted

by the specific facts and circumstances of these cases -- which at a minimum are limited to assignments of petroleum franchises -- and do not have broad applicability.

The court, after considering hundreds of pages of affidavits, deposition excerpts, and other exhibits, found that with respect to the three critical elements of a petroleum franchise relationship there had been no material change in the benefits or burdens to the petitioners. This finding was necessarily based on the application of the particular facts of this transaction and is simply not the kind of ruling appropriate for Supreme Court review.

The second question set forth by the petitioners is the claim that there are "substantially conflicting decisions of numerous Federal District and Appellate Courts regarding question number 1 above"

which require "resolution by this Court." Pet. Br. at i. This claim is at best misleading. There have been four decisions by courts of appeals which address the general issue of whether an assignment of a franchise constitutes a nonrenewal or termination. All four have held that there is no nonrenewal or termination if the assignment complies with the applicable state law. See Ackley, et al. v. Gulf Oil Corp., et al., 889 F.2d 1280 (2d Cir. 1989); May-Som Gulf Inc. v. Chevron U.S.A., et al., 869 F.2d 917 (6th Cir. 1989); Fresher v. Shell Oil Company, 846 F.2d 45 (9th Cir. 1988); Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986). It should be noted that May-Som is a case based on virtually the same transaction as the one in Ackley. With respect to the specific facts of the two cases, the appellate courts affirmed the district courts'

rulings that the assignments were valid under state law.

It has been at the district court level that there have been inconsistencies. In addition to the Ackley and May-Som cases, there have been lawsuits brought by dealers in Massachusetts, New York, New Jersey and Pennsylvania challenging the Chevron Transaction. See Cedar Brook Service Station, Inc., et al. v. Chevron U.S.A., Inc., et al., CV-86-4240 (E.D.N.Y. June 5, 1989); Chestnut Hill Gulf, Inc., et al. v. Cumberland Farms, Inc., et al., Docket No. 86-3519-MC (D. Mass. 1988), Memorandum and Order, October 13, 1988; Smith, et al. v. Cumberland Farms, Inc., et al., C.A. 87-1051 (W.D. Pa. August 15, 1988); Florham Park Chevron, Inc., et al. v. Chevron, U.S.A., Inc., et al., 2 Bus. Fran. Guide (CCH) ¶9011 (D.N.J. 1987). The courts in these actions have ruled that even if the

assignment was valid under state law, Chevron and Cumberland must demonstrate that there was a valid market withdrawal under the PMPA. All but the Cedar Brook decision, however, were handed down prior to the Sixth Circuit's opinion in May-Som and all of them, including Cedar Brook, preceded the Second Circuit's ruling in Ackley.[5/] Moreover, in Smith, the

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5/ In a bizarre twist of logic, petitioners argue that "the Second Circuit's affirmation of the Connecticut District Court's opinion in this regard therefore would apparently also be in direct conflict with the Opinion of its own Eastern District in Cedar Brook, supra." Pet. Br. at 44 - 45. An appellate ruling can never be in conflict with a district court decision -- higher court rulings reverse inconsistent lower court decisions. Since Cedar Brook was decided prior to the affirmance in Ackley, it would appear that an appeal on this issue would lead to a reversal. Not suprisingly, the defendants in Cedar Brook have already moved in the district court for reconsideration of its decision on this issue in light of Ackley.

Pennsylvania district court granted summary judgment for the defendants on the alternative ground of a valid market withdrawal, so no appeal was taken on the assignment ruling.

The other three cases are still pending and in both Cedar Brook and Florham Park the defendants have moved for reconsideration of the earlier summary judgment rulings.[6/] If, and only if, the rulings by the district courts are not modified based on May-Som and Ackley and are affirmed on an appeal, will there be a conflict among the circuits. As of

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6/ Other district court decisions have held that valid assignments of franchises do not trigger the PMPA. Burns Brothers, Inc. v. RMT Properties, Inc., 2 Bus. Fran. Guide (CCH) ¶8468 (D. Ore. 1985) aff'd 805 F.2d 1039 (9th Cir. 1986); Aldrich v. Amoco Oil Company, 2 Bus. Fran. Guide (CCH) ¶8322 (S.D. Iowa 1985); McGee v. Gulf Oil Corp., 2 Bus. Fran. Guide (CCH) ¶8379 (N.D. Ala. 1985).

now, there is only uniformity among the circuits and any suggestion to the contrary is simply inaccurate.7/

The third question put forth by the petitioners as warranting review is whether Chevron's delegation of its obligations under the franchise agreements was

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7/ Absent such a conflict, a disagreement between a decision of a district court and that of various courts of appeals is not a sufficient ground to grant the petitioners' writ. As was stated by former Supreme Court Justice Harlan:

> Generally speaking, nothing short of a difference of decision between two courts of appeals, or between a court of appeals and the court of claims, whose judgments are reviewable directly by the Supreme Court, will suffice to satisfy the conflict rule. A conflict of decision between two district courts is not a ground for certiorari, since resolution of such conflict is a matter resting with the courts of appeals. . . .

See 13 Moore's Federal Practice ¶817.21 citing Harlan, Manning the Dikes 13 Record N.Y.C.B.A. 541, 552 (1958).

permissible. This is the same question, in effect, that is being asked in the petitioners' first question. The question is one that arises under state law and one whose answer necessarily depends upon the particular facts of each assignment. Petitioners also argue that the assignment resulted in the loss of their "explicit and intended remedial statutory rights and protections." Pet. Br. at i - ii. This claim also concerns solely state statutory rights and does not implicate any federal questions.

The fourth claimed question for review is whether a valid petroleum market withdrawal has occurred. Seeking review on this question borders on the frivolous because neither the district court nor the appellate court ruled on this issue, having already determined that the assignment was valid and did not trigger the PMPA. Quite

simply, there is no decision from the courts below for this Court to review.

The fifth question seeks review of how the district court interpreted and applied the CPFA, a state statute. First of all, the petitioners' representation that the "Courts below have ignored the legislatively intended specific inclusionary language in the statute" [sic] (Pet. Br. at 57) is false. The district court directly addressed this claim (District Court Ruling, Pet. App. at 52(a) - 54(a)) and disagreed with the petitioners' argument. Secondly, the petitioners' suggestion that the decision by the district court is inconsistent with the decision by the Connecticut Supreme Court in Muha v. United Oil Co., 180 Conn. 720 (1980) is also incorrect. The Connecticut Supreme Court did state that the amendment in question was intended to

include other types of relationships as possible franchises. The Court also made it abundantly clear that whatever the relationship was, there was still no franchise within the meaning of the CPFA unless the supplier had prescribed a marketing plan or system. Finally, this question obviously relates to the application of a state statute to the specific facts of this case, and is not the kind of issue appropriate for Supreme Court review.

IV. CONCLUSION

For the foregoing reasons, Cumberland respectfully requests that the petition be denied in all respects.

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In the Supreme Court

OF THE

United States

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FRANK ACKLEY,
dba VILLAGE SQUARE CHEVRON, et al.,
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vs.

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CUMBERLAND FARMS, INC.,
Respondents.

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QUESTIONS PRESENTED FOR REVIEW

1. Did the assignment of petitioners' franchise agreements comply with Connecticut law, thereby making the federal Petroleum Marketing Practices Act inapplicable to the transaction?

2. Were petitioner service station dealers "franchisees" under the Connecticut Petroleum Franchise Act?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
A. Proceedings Below	1
B. Statement of Facts	2
REASONS WHY THE WRIT SHOULD BE DENIED	4
I	
THERE IS NO DISPUTE REGARDING EITHER THE APPLICABILITY OR CONTENT OF THE STATE LAW CONCERNING ASSIGNMENT. PETITIONERS DISPUTE ONLY THE APPLICATION OF THAT LAW TO THE FACTS IN THIS CASE	5
A. The Sole Question Presented Is One of State Law: Whether the Assignments Were Valid Under the Law of Connecticut	5
B. Petitioners' Arguments That the Assignments Were Invalid Are Without Merit	8
II	
THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS	10
III	
IN ANY EVENT, CHEVRON HAS FULLY COMPLIED WITH THE MARKET WITHDRAWAL PROVISION OF THE PMPA	12
A. Chevron Has Determined To Withdraw From the Northeast	12
B. Chevron's Notices of Nonrenewal Satisfied All Requirements of the PMPA	14
IV	
THE COURT OF APPEALS PROPERLY HELD THAT PETITIONERS WERE NOT "FRANCHISEES" UNDER CONNECTICUT LAW	16
CONCLUSION	17

TABLE OF AUTHORITIES

Cases

Page

Ackley v. Gulf Oil Corp., 726 F.Supp. 353 (D.Conn. 1989) 2

Ackley v. Gulf Oil Corp., 889 F.2d 1280 (2d Cir. 1989) ..2, 10

Aldrich v. Amoco Oil Co., Bus.Franchise Guide (CCH) ¶ 8322 (1985-1986 Transfer Binder) (S.D.Iowa 1985) .. 6

Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986) 6, 10, 11

Berliner Foods Corp. v. Pillsbury Co., 633 F.Supp. 557 (D.Md. 1986) 9

Brattleboro Auto Sales v. Subaru of New England, 633 F.2d 649 (2d Cir. 1980) 9

Burns Bros., Inc. v. RMT Properties Inc., Bus.Franchise Guide (CCH) ¶ 8468 (1985-1986 Transfer Binder) (D.Or. 1985), affirmed, 805 F.2d 1039 (9th Cir. 1986) ... 6

Cedar Brook Service Station v. Chevron U.S.A., Inc., Docket No. 86-4240 (E.D.N.Y. 1989) 11, 14, 15

Chestnut Hill Gulf v. Cumberland Farms, Docket No. 86-3519 (D.Mass. 1988) 11

Florham Park Chevron, Inc. v. Chevron U.S.A., Inc., Bus.Franchise Guide (CCH) ¶ 9011 (1987-1989 Transfer Binder) (D.N.J. 1987) 10, 14, 15

Fresher v. Shell Oil Co., 846 F.2d 45 (9th Cir. 1988) 6, 10

May-Som Gulf, Inc. v. Chevron U.S.A., Inc., 869 F.2d 917 (6th Cir. 1989) 6, 8, 10, 11, 15

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McGee v. Gulf Oil Corp., Bus.Franchise Guide (CCH) ¶ 8379 (1985-1986 Transfer Binder) (N.D.Ala. 1985) 6, 7-8

Pride v. Exxon Corp., 2 Bus.Franchise Guide (CCH) ¶ 9385 (D.Or. 1989) 14

Russo v. Texaco, Inc., 808 F.2d 221 (2d Cir. 1986) 16

Sally Beauty Co., Inc. v. Nexxus Products Co., Inc., 801 F.2d 1001 (7th Cir. 1986) 9

Smith v. Cumberland Farms, Inc., Docket No. 87-1051, Magistrate's Report and Recommendation adopted by Order (W.D.Pa. 1988) 11, 14

TABLE OF AUTHORITIES

Statutes and Codes

Connecticut Petroleum Franchise Act
(Conn.Gen.Stat. §§ 42-133j - 42-133n) 2, 16
General Statutes of Connecticut:
Section 14-344 8
Section 42a-1-203 10
Section 42a-2-210 ..... 7, 8
Section 42a-2-305(2) 10
Petroleum Marketing Practices Act:
15 U.S.C. §§ 2801-2806 1-2
15 U.S.C. § 2802(b)(1) 14
15 U.S.C. § 2802(b)(2)(E) 12
15 U.S.C. § 2804 14
15 U.S.C. § 2804(b) 14
15 U.S.C. § 2805(c) 5
15 U.S.C. § 2806(b) 5, 11
Uniform Commercial Code:
Section 1-203 10
Section 2-210 ..... 6, 8
Section 2-305(2) 10

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Proceedings Below.

On May 31, 1986, Chevron U.S.A. sold to Cumberland Farms all of Chevron's motor fuel marketing assets in the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, New Jersey and Delaware (collectively the "Northeast").

Petitioners (plaintiffs below) are 12 service station dealers in Connecticut who, at the time of the sale to Cumberland, leased their service stations from Chevron pursuant to written leases and purchased gasoline from Chevron pursuant to written supply agreements. Petitioners sued Chevron and Cumberland, claiming that Chevron's sale to Cumberland did not comply with the federal Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-

2806 (the "PMPA"). Petitioners also claimed that, even if the PMPA was not violated, their dealer agreements were automatically renewed (at the prior rents) with Cumberland pursuant to the Connecticut Petroleum Franchise Act (Conn.Gen.Stat. §§ 42-133j to 42-133n).

All parties moved for summary judgment. Chevron and Cumberland set forth two separate and independent grounds for summary judgment with respect to PMPA issues: First, the sale of Chevron's ongoing business operation complied with the Connecticut law governing assignments, and therefore it did not result in a "termination" or "nonrenewal" of the dealers' franchise agreements, an essential prerequisite to any PMPA cause of action. Alternatively, even if the sale resulted in a termination or nonrenewal, the defendants fully satisfied the market withdrawal defense to a PMPA claim. Chevron and Cumberland also moved for summary judgment on the dealers' state law claims.

The district court granted summary judgment in favor of Chevron and Cumberland. *Ackley v. Gulf Oil Corp.*, 726 F.Supp. 353 (D.Conn. 1989). It held that the PMPA was not applicable to the sale, because the sale complied with Connecticut law and therefore the plaintiff dealers had failed to show either a "termination" or "nonrenewal" of their franchises.[1] The court also granted summary judgment to Chevron and Cumberland on the dealers' state law claims, holding that the Connecticut Petroleum Franchise Act was inapplicable.

The Court of Appeals affirmed, adopting the "comprehensive and well-reasoned" opinion of the district court. *Ackley v. Gulf Oil Corp.*, 889 F.2d 1280 (2d Cir. 1989).

B. Statement of Facts.

The relevant facts, which are summarized in the opinion of the district court (Pet.Appx., pp. 6-14), are as follows:

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[1] Because the district court viewed the PMPA as inapplicable, it did not reach the alternative ground on which Chevron and Cumberland relied, i.e., the existence of a lawful market withdrawal.

Chevron structured the sale to Cumberland so as to minimize its impact upon Gulf and Chevron service station dealers and to protect the continuity of dealer leases and dealer supply contracts under the Gulf and Chevron trademarks. Section 2.5 of the Asset Purchase Agreement expressly required Cumberland to assume all of Chevron's contractual commitments, including its existing dealer leases and supply agreements. Section 8.6 expressly required Cumberland, as agreements subject to the PMPA came up for renewal, to "offer, in good faith, * * * a new 'franchise' on terms and conditions which are not discriminatory" to each current dealer.

To assure the continued availability to Gulf dealers of the "Gulf" trademark, Chevron granted to Cumberland exclusive use of that trademark at northeast service stations for a period of 15-1/2 years at no royalty, with an option to renew the license indefinitely for an annual royalty of $1 million per year.[2]

Ancillary to the sale of assets, Chevron and Cumberland executed a Product Sales Agreement under which Chevron agreed to sell to Cumberland essentially the entire gasoline output of Chevron's Philadelphia refinery. This supply, along with purchases under an output agreement with a Canadian refinery and purchases on the New York Harbor Spot Market, satisfy substantially all of Cumberland's needs for fuel in the northeast market.

On February 14, 1986, after the Asset Purchase Agreement was signed but before the sale closed, Chevron sent formal notices of nonrenewal under the PMPA to all Gulf and Chevron branded dealers affected by the sale. Those notices stated that Chevron did not believe that its sale to Cumberland involved a termination or

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[2] To accomodate those dealers who operated under the "Chevron" brand at the time of the sale, Chevron granted to Cumberland the right to use the Chevron trademark at no royalty for a transition period of two years or for the remainder of the term of each existing dealer agreement, whichever was longer. The parties contemplated that, upon the two-year expiration of the Chevron trademark license, but in no event earlier than the expiration of any existing dealer agreement, the brand name at the Chevron stations would be converted to Gulf.

nonrenewal under the PMPA, but that Chevron nevertheless was taking the precaution of giving at least 180 days' notice of nonrenewal under the PMPA based on Chevron's decision to withdraw from the 10-state area. The notices also stated that, for the remainder of the term of the existing agreements, Chevron's rights had been assigned and its duties delegated to Cumberland, and that Cumberland would honor all provisions of those agreements. The notices recited Cumberland's promise, upon expiration of each dealer's current agreements with Chevron, to offer nondiscriminatory renewal agreements as required by the PMPA.

On March 10, 1986, Chevron sent to all Gulf and Chevron dealers in Connecticut a second and superseding notice of nonrenewal. The March 10 notices were substantively identical to those of February 14, except that they gave a minimum of one year's notice.

REASONS WHY THE WRIT SHOULD BE DENIED

This case presents no conflicts among the Courts of Appeals, no conflict with the decisions of this Court, no novel federal issue, nor any other matter worthy of this Court's attention. All four Courts of Appeals that have considered this issue have adopted similar legal standards, which standards in turn refer to state law. There is no dispute between the parties regarding the proper legal standard, but only with regard to the application of state law to the facts in this case.

I

THERE IS NO DISPUTE REGARDING EITHER THE APPLICABILITY OR CONTENT OF THE STATE LAW CONCERNING ASSIGNMENT. PETITIONERS DISPUTE ONLY THE APPLICATION OF THAT LAW TO THE FACTS IN THIS CASE.

A. The Sole Question Presented Is One of State Law: Whether the Assignments Were Valid Under the Law of Connecticut.

The PMPA requires a plaintiff to show either termination or nonrenewal as a basic prerequisite to any cause of action. Section 2805(c) states:

> "In any action [under the PMPA], the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship."

The courts below properly held that petitioners could not meet this test. Chevron's sale of its northeast marketing assets to Cumberland left undisturbed all of the rights protected by the PMPA. The undisputed facts show that each dealer's franchise remained fully in effect, both before and after the sale. The dealers continued to occupy the same service stations under the same leases; they continued to purchase Gulf brand gasoline under the same supply agreements; they continued to do business under the same Gulf trademarks. They retained all of their rights under the PMPA against their new franchisor, Cumberland.

Thus, an assignment from Chevron to Cumberland occurred; a termination or nonrenewal did not. The PMPA contemplates that franchise agreements between a supplier and its dealers can be assigned without triggering the termination or nonrenewal provisions. Section 2806(b) states:

> "Nothing in this subchapter * * * prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise."

All four Courts of Appeals, including the court below, that have considered this statute agree upon its interpretation. As the Sixth Circuit recently held, a franchisee seeking to establish a PMPA cause of action based on the assignment of his franchise from one franchisor to another must prove either:

> "(1) [T]hat by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises) * * * or (2) that the franchisor made the assignment in violation of state law." *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989) (affirming, on facts virtually identical to those here, a summary judgment in favor of Chevron and Cumberland in a PMPA action brought by service station dealers challenging Chevron's sale to Cumberland of its marketing assets in Ohio).

Similar tests were applied both by the Fourth Circuit in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), and by the Ninth Circuit in *Fresher v. Shell Oil Co.*, 846 F.2d 45 (9th Cir. 1988).[3]

Petitioners have conceded, and the courts below held, that petitioners cannot establish the loss of any of the three statutory components of a PMPA franchise. Pet.Appx., pp. 29-30. Petitioners have instead contended that the alternative test for a cause of action is satisfied, i.e., that the assignment from Chevron to Cumberland was invalid under Connecticut law. Pet., pp. 26-38.

It is undisputed that the state law applicable here is Uniform Commercial Code section 2-210 (as adopted in Connecticut),

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[3] Other decisions hold that franchises can be assigned without triggering PMPA causes of action. *Burns Bros., Inc. v. RMT Properties Inc.*, Bus.Franchise Guide (CCH) ¶ 8468 (1985-1986 Transfer Binder) (D.Or. 1985), affirmed, 805 F.2d 1039 (9th Cir. 1986); *McGee v. Gulf Oil Corp.*, Bus.Franchise Guide (CCH) ¶ 8379 (1985-1986 Transfer Binder) (N.D.Ala. 1985); *Aldrich v. Amoco Oil Co.*, Bus. Franchise Guide (CCH) ¶ 8322 (1985-1986 Transfer Binder) (S.D.Iowa 1985).

under which contracts between a buyer and seller are made assignable as follows:

> "(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.
>
> "(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract or impair materially his chance of obtaining return performance. * * *." Conn.Gen.Stat. § 42a-2-210.

Under subsection (1) of this statute, Chevron was entitled to delegate to Cumberland the task of fulfilling Chevron's obligations to the dealers. Such delegation did not release Chevron from its contractual obligations to the dealers in the event Cumberland failed to perform. Chevron remained a guarantor of Cumberland's performance.

The only exception to the right to delegate found in subsection (1) expresses the common law rule that duties of a personal nature must be performed by the original obligor. The exception is inapplicable here because Chevron had no contractual obligations to the dealers of a personal nature. Chevron was only a landlord and a commercial seller of branded gasoline, and dealer leases and supply agreements are not personal:

> "Plaintiff argues that the restriction on his ability to assign indicates the contract was personal and therefore nonassignable by Gulf. The court disagrees. The restriction on plaintiff's ability to assign establishes only that his services were, from Gulf's point of view, personal. It does not establish the converse. From the nature of the contracts involved, Gulf's obligations were clearly not of such a personal nature as to prohibit assignment." *McGee v. Gulf Oil Corp.*, Bus.Franchise Guide (CCH) ¶ 8379 (1985-1986 Transfer

Binder) (N.D.Ala. 1985), p. 15,348; accord *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, supra, 869 F.2d at 924.

The only remaining restrictions on assignment are found in subsection (2) of U.C.C. section 2-210, which permitted Chevron to assign its expectation of performance from the dealers, unless the dealers' duties, burdens or risks would be increased, or their chance of obtaining return performance impaired. None of these exceptions applies here.

The undisputed evidence shows that the assignment to Cumberland of the dealers' agreements in no way increased the burdens on plaintiffs in paying for their gasoline, paying their rents or performing their other contractual duties. Pet.Appx., pp. 34-40. Nor is there any evidence that Cumberland is not fully able to fulfill Chevron's contractual obligations to the dealers. Pet.Appx., pp. 29-30.

B. Petitioners' Arguments That the Assignments Were Invalid Are Without Merit.

Plaintiffs argue (Pet., pp. 32-38) that Chevron's sale to Cumberland increased plaintiffs' burdens or risks under their franchise agreements in violation of Connecticut law (U.C.C. § 2-210; Conn.Gen.Stat. § 42a-2-210) because Cumberland, unlike Chevron, was not subject to a Connecticut law (Conn.Gen.Stat. § 14-344) which precludes refiners from directly operating service stations with employees.

However, the fact that Cumberland operated its own company service stations in no way impaired Cumberland's ability to carry out its supply obligations under the assigned contracts. This was demonstrated by the fact that each of the assigned agreements had expired at the time of the ruling below, and petitioners were not able to offer any evidence that any of the assigned agreements had been breached by Cumberland in any way. Pet.Appx., pp. 34-40.

It is correct that Connecticut law precludes refiners such as Chevron from operating company-operated stations. However, it does not preclude distributors such as Cumberland from doing so. In other words, although the Connecticut legislature concluded

there might be a problem with refiner-operated stations, it did not perceive the same problem with distributor-operated stations.

Moreover, the district court found there was no evidence that any of the petitioners' service stations actually compete with Cumberland-operated stations:

> "Although Cumberland undisputedly owns 57 convenience stores selling gasoline in Connecticut, * * * none of the dealers in deposition testimony identified a Cumberland-operated station in his marketing area." Pet.Appx., pp. 37-38.

And, as the district court held, to the extent there was any competition between petitioners and Cumberland-operated stations, there is no evidence that the nature of that competition was any different after Chevron's sale to Cumberland than it was before the sale. Pet.Appx., pp. 39-40.

The two cases cited by plaintiffs (Pet., p. 32) are inapposite. In both *Sally Beauty Co., Inc. v. Nexxus Products Co., Inc.*, 801 F.2d 1001 (7th Cir. 1986), and *Berliner Foods Corp. v. Pillsbury Co.*, 633 F.Supp. 557 (D.Md. 1986), a manufacturer terminated an exclusive distributorship after the distributor was acquired by a competing manufacturer. In ruling that the duties to distribute could not be delegated, these courts merely acknowledged the obvious—a manufacturer should not be required to entrust the exclusive distribution of its products solely to a competing manufacturer. The interests of the acquiring manufacturer are inherently opposed to the proper performance of the distribution agreement.

In this case, by contrast, there is nothing inherent in the relationship between Cumberland and the dealers to preclude Cumberland from being both an effective supplier to the dealers and an operator of stations. Such "dual distribution" arrangements are common in the gasoline industry. Cumberland had every incentive to work cooperatively with the dealers and to assist them in every way possible. Pet.Appx., n. 15, pp. 77-78.[4]

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[4] Petitioners' citation to *Brattleboro Auto Sales v. Subaru of New England*, 633 F.2d 649 (2d Cir. 1980), is similarly inapt. In that case,

Petitioners also speculate that Cumberland may utilize this dual relationship in bad faith to injure petitioners. Pet., pp. 34-38. This is irrelevant to the issue of the validity of the assignments, since the agreements which were assigned have all expired without any actual exercise of bad faith. Furthermore, if petitioners' fears were to be realized in the future, petitioners could obtain redress, both under the PMPA and under the requirements of the Uniform Commercial Code that sellers of goods deal in good faith. U.C.C. §§ 1-203, 2-305(2); Conn.Gen.Stat. §§ 42a-1-203, 42a-2-305(2).

II

THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS

As discussed above (p. 6), all Courts of Appeals that have considered this issue (including both Courts of Appeals that have reviewed Chevron's sale to Cumberland) have established similar tests to determine whether an assignment from one franchisor to another triggers the PMPA. *Ackley v. Gulf Oil Corporation*, 889 F.2d 1280 (2d Cir. 1989); *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917 (6th Cir. 1989); *Fresher v. Shell Oil Co.*, 846 F.2d 45 (9th Cir. 1988); *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). The Second Circuit properly held that petitioners cannot satisfy those tests.

Petitioners, however, rely on a district court opinion in *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, Bus.Franchise Guide (CCH) ¶ 9011 (1987-1989 Transfer Binder) (D.N.J. 1987) ("*Florham Park I*"). There, a New Jersey district court held that the assignment of Chevron's northeast marketing assets did trig-

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the Second Circuit held that it was not unlawful (under the antitrust laws or under the Vermont automobile dealer bill of rights) for an automobile manufacturer to terminate its supply relationship with a new car dealer, as apparently permitted by the contract, when the dealer took on a number of competing lines of automobiles. The case does not suggest that the dealer's adoption of competing lines was a breach of the agreement. Indeed, it is common in that industry for dealers to carry competing lines.

ger the PMPA. Although that court purported to rely on the Fourth Circuit's opinion in *Barnes v. Gulf Oil Corp.*, supra, to find a nonrenewal under the PMPA, the court in fact did not find the necessary factual basis for applying *Barnes*. This anomaly was noted by the Sixth Circuit:

> "We find the *Florham Park I* decision to be problematic for three reasons. First, the district court did not find that Chevron or Cumberland breached the pricing provision of the Gulf franchise agreements. Second, the district court did not find that Chevron's assignment to Cumberland of the Gulf franchise agreements was invalid under New Jersey state law. Thus, the district court failed to find the necessary facts to correctly apply *Barnes*. Third, the *Florham Park I* court commented that the 'cases cited by Chevron all involve transactions on a much smaller scale—assignment of a single franchise to a "jobber"—than the Chevron-Cumberland sale of assets.' See id. at 18,419. The district court, however, provided no rationale for its implicit rule that invocation of the PMPA should turn on the size of the challenged transaction. In addition, contrary to the *Florham Park I* court's comments, Chevron cited to *Fresher v. Shell Oil Co.*, Bus. Franchise Guide (CCH) ¶ 8800 (D.Or. 1987), a case which was brought, under the PMPA, by *several* service station dealers. Agreeing substantially with the Ninth Circuit's *Fresher* decision, we decline, on the assignment issue, to follow *Florham Park I*." 869 F.2d at 922-923, n. 3.[5]

In this case, the courts below correctly refused to follow *Florham Park I* on the basis that it would render meaningless section 2806(b) of PMPA, which authorizes the assignment of franchises pursuant to state law. Pet.Appx., n. 9, pp. 71-74. That

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[5] Three other district courts dealing with this same transaction have, in unreported decisions, followed *Florham Park I*. *Smith v. Cumberland Farms, Inc.*, Docket No. 87-1051, Magistrate's Report and Recommendation adopted by Order (W.D.Pa. 1988); *Chestnut Hill Gulf v. Cumberland Farms*, Docket No. 86-3519 (D.Mass. 1988); *Cedar Brook Service Station v. Chevron U.S.A., Inc.*, Docket No. 86-4240 (E.D.N.Y. 1989).

conclusion is, as discussed, in accord with the holdings of each of the Courts of Appeals that have considered this issue.

III

IN ANY EVENT, CHEVRON HAS FULLY COMPLIED WITH THE MARKET WITHDRAWAL PROVISION OF THE PMPA.

Petitioners also address (Pet., pp. 48-55) two issues not reached below, both of which are relevant to Chevron's alternative basis for summary judgment on petitioners' PMPA claims, i.e., that Chevron fully complied with the market withdrawal provision of the PMPA. Section 2802(b)(2)(E), Pet.Appx., pp. 86-88. Because the courts below held that Chevron's sale to Cumberland was not subject to the PMPA in the first place, they did not find it necessary to address these issues. However, Chevron's compliance with the market withdrawal provision provides an additional reason why the judgment below is correct.

A. Chevron Has Determined To Withdraw From the Northeast.

The PMPA authorizes termination or nonrenewal based upon a decision "to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area." Section 2802(b)(2)(E). Petitioners contend that the market withdrawal provision is not available to Chevron, because Chevron continues to operate a refinery in Philadelphia, sells gasoline produced in that refinery to Cumberland, and has authorized Cumberland to utilize the Gulf brand. Pet., pp. 49-52.

If the sale from Chevron to Cumberland does not constitute a "determination to withdraw" from the market under the PMPA, it is difficult to imagine what would. Chevron sold every distribution terminal, every service station, every warehouse, every office, and every delivery vehicle that it owned in the Northeast, together with all of the related inventories and accounts receivable. In short, Chevron sold every single asset that it owned relating to the "marketing of motor fuels through retail outlets in the relevant geographic market area."

Nor does the fact that Chevron sells most of the gasoline output of its Philadelphia refinery to Cumberland negate a market withdrawal. Chevron's gasoline supply contract with Cumberland (Joint Appendix on Appeal to the Second Circuit ("JA") at Vol. VI, pp. 2285-2390) is unrelated to any aspect of Cumberland's compliance with its obligations to plaintiffs under the PMPA or otherwise. The supply contract calls for deliveries in pipeline or barge quantities at Chevron's Philadelphia refinery. The supply contract does not specify that the gasoline is to be resold to "retail outlets" or under any particular brand. Although the gasoline delivered to Cumberland at Philadelphia generally meets the specifications for Gulf gasoline which Cumberland is permitted to resell under its trademark license, Cumberland is free to obtain similarly qualifying gasoline from any source.[6] With or without the Chevron supply contract, Cumberland would continue to sell gasoline to plaintiffs under the Gulf brand. In short, the trademark license and the supply contract are entirely independent of one another. The supply agreement can be terminated without cause by either party at the end of any contract year (JA at Vol. VI, p. 2347), whereas the trademark license will last for at least 15½ years and probably will continue in perpetuity. Pet.Appx., p. 9.

Plaintiffs' contention that Chevron has not made a determination to withdraw has been flatly rejected in other cases:

> "The withdrawal provision of the Act refers specifically to 'marketing of motor fuel through retail outlets.' Chevron's continued refining activity and its sale of the fuel on a wholesale level to Cumberland Farms is not marketing through *retail outlets*. Furthermore, Chevron's licensing of its trademarks to Cumberland Farms is not even 'marketing.' Without question, Chevron motor fuel continues to be marketed in the relevant geographic area; Chevron, however, no longer markets the fuel." *Florham Park Chevron, Inc. v.*

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[6] In fact, Cumberland purchases gasoline from a variety of sources, and 25 to 50 percent of the gasoline sold by Cumberland in Connecticut is purchased from sources other than Chevron's Philadelphia refinery. JA at Vol. III, pp. 890-892.

Chevron U.S.A., Inc., Bus.Franchise Guide (CCH) ¶ 9011 (1987-1989 Transfer Binder) (D.N.J. 1987), p. 18,420 (emphasis in original); accord *Cedar Brook Service Station v. Chevron U.S.A., Inc.*, Docket No. 86-4240 (E.D.N.Y. 1989), p. 16; *Smith v. Cumberland Farms, Inc.*, Docket No. 87-1051 (W.D.Pa. 1988), p. 13.[7]

B. Chevron's Notices of Nonrenewal Satisfied All Requirements of the PMPA.

There is no dispute that notices, dated February 14, 1986, and March 10, 1986, were sent to and received by petitioners in the manner required by sections 2802(b)(1) and 2804 of the PMPA. In each of those letters, Chevron advised all of its dealers that it did not believe the sale to Cumberland triggered the PMPA but that, in the event someone might think differently, Chevron was giving notice of its intent not to renew the dealers' franchise relationships based on Chevron's "determination to withdraw from the marketing of motor fuels through retail outlets" in the Northeast. Pet.Appx., pp. 11-12.

The notice of February 14 stated that nonrenewal, if it occurred at all, would become effective at the later of (i) expiration of the dealer's current agreements or (ii) 180 days after the dealer's receipt of the notice. Pet.Appx., pp. 12-13. The notice given on March 10 was substantively identical to that given on February 14, except that it provided that nonrenewal would occur, if at all, at the later of (i) expiration of the dealer's current agreements or (ii) one year after the dealer's receipt of the March 10 notice. Pet.Appx., p. 13.

Petitioners argue (Pet., pp. 52-54) that Chevron failed to give the 180 days' notice required by section 2804(b) for a proper market withdrawal, because the closing of the sale to Cumberland occurred May 31, 1986, 82 days after the March 10 notice. That argument misperceives the effect of the March 10 notice. The

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[7] See also *Pride v. Exxon Corp.*, 2 Bus.Franchise Guide (CCH) ¶ 9385 (D.Or. 1989), pp. 20,037, 20,040-20,041 (the "market withdrawal" provision of PMPA does not require the supplier to withdraw from "unbranded" sales in the relevant area).

closing of the sale did not operate to terminate plaintiffs' franchise agreements with Chevron. Chevron simply delegated to Cumberland the performance of Chevron's contractual obligations to plaintiffs between the closing date and the effective date of nonrenewal. Chevron's notice gave every dealer a minimum of one year's notice and most dealers received considerably more.

District courts in New Jersey, New York and Ohio have rejected the very argument petitioners make here and held that the notices of nonrenewal given by Chevron satisfied the PMPA:

> "Plaintiffs contend that such notice is insufficient because it is not 180 days prior to May 31, 1986, the effective [closing] date of the Chevron-Cumberland asset purchase agreement.
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> "Plaintiffs' argument rests on the position that nonrenewal of plaintiffs' franchise relationships occurred on May 31, the date that the assignment of the leases went into effect. However, 'nonrenewal' is defined as a 'failure to reinstate, continue, or extend the franchise relationship at the conclusion of the term, or on the expiration date, stated in the relevant franchise.' 15 U.S.C. § 2801(14)(A). Therefore, nonrenewal occurred for each plaintiff on the expiration date of their prior franchise with Chevron.
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> * * * * *
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> "The court concludes that Chevron did provide notice within 180 days prior to nonrenewal as required by § 2804(b)(2)(A)." *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, Bus.Franchise Guide (CCH) ¶ 9011 (1987-1989 Transfer Binder) (D.N.J. 1987), p. 18,421; accord *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, Bus.Franchise Guide (CCH) ¶ 9000 (1987-1989 Transfer Binder) (N.D.Ohio 1987), pp. 18,328-18,329, affirmed, 869 F.2d 917 (6th Cir. 1989); *Cedar Brook Service Station v. Chevron U.S.A., Inc.*, Docket No. 86-4240 (E.D.N.Y. 1989), pp. 18-19.

The Second Circuit has also implicitly recognized the legitimacy of a selling franchisor delegating to the buyer its contractual duties to dealers under existing leases and supply agreements during the period of time between the closing of the sale and the effective dates of the notices of termination or nonrenewal. In *Russo v. Texaco, Inc.*, 808 F.2d 221, 225 (2d Cir. 1986), termination notices were held to be timely even though they were sent several weeks after the closing of Texaco's sale of marketing assets to Power Test.

IV

THE COURT OF APPEALS PROPERLY HELD THAT PETITIONERS WERE NOT "FRANCHISEES" UNDER CONNECTICUT LAW.

Petitioners also claim that, even if the PMPA was not violated, their dealer agreements were automatically renewed (at the prior rents) with Cumberland pursuant to the Connecticut Petroleum Franchise Act (Conn.Gen.Stat. §§ 42-133j to 42-133n). Pet., pp. 55-58. The courts below held that the Connecticut statute was not applicable, because petitioners were not "franchisees" within the meaning of the statute. That decision involves no federal question. Moreover, it is supported by a substantial body of cases, which are cited in the opinion of the district court. Pet.Appx., pp. 42-55.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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